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(95 F.C.C. 2d)

**Decisions, Reports, Public Notices, and Other Documents of
the Federal Communications Commission of
the United States**

VOLUME 95 (2d Series)

Pages 1 to 456

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Commissioner Fogarty's term expired June 30, 1983.
Commissioner Jones resigned May 31, 1983.
Commissioner Sharp's term expired June 30, 1983.
*Sworn in December 2, 1983.

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(See also: CATV Program Exclusivity, Network Programming–*Community Tele-Communications, Inc.*)
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Employment, Equal Employment Opportunity Rule, Compliance Ordered

> **Certain license renewal applications granted. When minorities or women are not present on a licensee's staff in a percentage bearing a reasonable relationship to their presence in the local labor force and the licensee has not made a reasonable effort to recruit and hire minorities or women, appropriate remedial sanctions will be ordered.**
> **–*Alabama/Georgia B/c Stations***

FCC 83–413

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of Certain Broadcast
Stations Serving Communities in the
States of Alabama and Georgia

MEMORANDUM OPINION AND ORDER

(Adopted: September 9, 1983 Released: September 19, 1983)

BY THE COMMISSION:

1. The Commission has before it for consideration: (i) a "Petition to Deny and to Intervene" filed March 1, 1982, by the National Black Media Coalition and others (NBMC) against the license renewal applications of 15 broadcast stations serving various communities in the States of Alabama and Georgia;[1] (ii) opposition pleadings from all

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[1] Alabama stations challenged by NBMC include: in Birmingham, WERC (File No. BR-811130XF) and WKXX(FM) (File No. BRH-811130VX), licensed to Mooney-WERC, Inc.; in Mobile, WABB (File No. BR-811201A8) and WABB-FM (File No. BRH-811201WA), licensed to WABB, Inc., and WKRG (File No. BR-811201G4) and WKRG-FM (File No. BRH-811201WZ), licensed to WKRG-TV; in Montgomery, WHHY (File No. BR-811201ZF) and WHHY-FM (File No. BRH-811201YP), licensed to Holt-Robinson Communications Corp., and WKAB-TV (File No. BRCT-811130KO), licensed to Montgomery Independent Telecasters, Inc.; and in Phenix City, WEIZ(FM) (File No. BRH-811201C8), licensed to Chattahoochee Broadcasting Co. Georgia stations challenged include: in Albany, WALB-TV (File No. BRCT-811201KK), licensed to WALB-TV, Inc.; in Athens, WGAU (File No. BR-811201UP) and WNGC-FM File No. BRH-811201WC), licensed to Clarke Broadcasting Corporation, and WGTV(TV) (File No. BRET-811130KQ), licensed to Georgia Public Telecommunications Commission; and, in Columbus, WDAK (File No. BR-811201UD), licensed to Radio Columbus, Inc. The NBMC petition also included Station WYDE, Birmingham, and Stations WALG/WKAK(FM), Albany, as well as Stations WBRC-TV, Birmingham, WRDA/WQTU(FM), Rome and WSGA/WZAT(FM), Savannah, Georgia. With respect to WYDE and WALG/WKAK(FM), the Commission's staff requested additional information

licensees; (iii) a reply by NBMC; (iv) a letter from NBMC dated March 25, 1983, concerning Stations WDAK/WEIZ(FM); and (v) a response from the licensees.

2. Although NBMC argues, and the licensees dispute, that it has standing, review of the petition reveals that none of the claims therein is supported by the affidavit of a person who is a listener or a resident of the service area of any of the challenged stations. Accordingly, NBMC has not met the procedural requirements of a petition to deny.[2] Nevertheless, we will consider NBMC's pleading since the challenged stations' employment profiles were initially questionable.[3]

3. NBMC charges that the employment profiles and EEO programs of each of the challenged stations show that the licensees have not complied with the Commission's EEO rule (Section 73.2080 of the Commission's Rules) or policies. Further, NBMC observes that some of the stations now challenged were previously subject to EEO conditions, and it contends that their performance has not appreciably changed in spite of those sanctions. Accordingly, NBMC requests that the Commission investigate the EEO practices of the challenged stations; designate their applications for an evidentiary hearing;[4] permit NBMC to intervene; and deny each of the applications.

4. Section 73.2080 of the Commission's Rules requires broadcast licensees to refrain from employment discrimination and to establish and maintain an affirmative action program which results in positive and continuing efforts to recruit, employ and promote qualified women and minorities. In assessing a licensee's compliance, the Commission first compares a station's employment profile to the available labor force. When that comparison reveals a reasonable relationship between the percentages of women and minorities on the station's staff and their presence in the available labor force, we merely review the station's EEO program to determine whether it is complete. However, when that comparison reveals that the percentage of women or minorities on the station's staff is less than the applicable processing criteria,[5] or when the employment practices of

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which has only recently been submitted. Accordingly, we will consider those stations' EEO performance in a separate Order. With respect to the remaining stations, NBMC withdrew its petition, and each station's license was ultimately renewed pursuant to delegated authority.

[2] 47 U.S.C. §309(d)(1); *NAB Petition for Rulemaking*, 82 F.C.C. 2d 89, 99 (1980).

[3] Section 0.283(b)(1)(iii) of the Commission's Rules.

[4] In the case of WGTV(TV), NBMC requests in its reply that the station's license be conditioned upon the submission of EEO progress reports.

[5] By Public Notice No. 14932, dated March 10, 1977, the Commission established processing criteria for the routine evaluation of license renewal applications whereby an in-depth review would be conducted of the EEO program of any station with more than 10 full-time employees whose female or minority employment did not reflect at least 50% of their percentage in the available labor force overall and 25% in the upper-four job categories. By Public Notice, FCC 80-

the station are challenged, we thoroughly review the station's EEO program, together with its Annual Employment Reports and any other relevant and material information concerning its employment practices. When the information available indicates that the licensee is complying with our EEO rule and policies, we deny EEO-based challenges and grant the pending application if otherwise appropriate. However, when that information indicates that any protected group is not being afforded equal opportunities in employment and that the cause is a faulty EEO program or an insufficient effort to implement that program, we order appropriate remedial sanctions. *E.g., Provident Broadcasting Company*, FCC 82–473, 52 R.R. 2d 766 (1982). Further, when the cause of an unreasonably low female or minority presence cannot be determined, we conduct an inquiry or an investigation. Finally, of course, when we find that a substantial and material question of fact exists, we designate the application for an evidentiary hearing. 47 U.S.C. §309; *Rust Communications Group*, 53 F.C.C. 2d 355 (1975). Thus, as the foregoing shows and as we have repeatedly stated, the determinative factors in our evaluation of a station's employment practices are not merely the station's employment statistics but the thoroughness of its EEO program and the good faith efforts undertaken to make that program work. *Chicago Metropolitan Broadcast Stations*, 89 F.C.C. 2d 1031 (1982).

5. Applying the foregoing principles, we have evaluated the stations' submissions in light of NBMC's arguments and the relevant labor force data for women and minorities,[6] and we find that the following stations' EEO performances evidence compliance with our EEO rule and policies:

(a) WHHY/WHHY-FM, Montgomery.

Labor force figures for the Montgomery SMSA show that there are 42.6% women and 30.6% minorities (30.1% Blacks). The stations' most recent license term employment report shows 28 full-time employees (all in the upper-four job categories), of whom six (21.4%) are women and four (14.3) are minorities. However, as petitioners note, the stations' prior license term employment reports show that employment of minorities in the upper-four job categories has been less than the 1982 figures. *See* Appendix. Review of the stations' EEO program reveals that the stations contacted numerous referral sources from which they obtained 204 referrals for the 23 positions filled during the twelve months prior to the filing of the renewal application. Of these new hires, six were females and three were minorities. At the same time, the stations had a training program with three local colleges whereby one female or minority student from each

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61, dated February 13, 1980, 46 R.R. 2d 1693 (1980), this processing criteria was extended to stations with 5 to 10 full-time employees. Further, the Commission revised the processing criteria for the upper-four job categories to 50% for stations with 11 or more full-time employees.

[6] Labor force figures for all Alabama markets were obtained from the Alabama Department of Industrial Relations' "Information for Affirmative Action Programs, 1981." Those for Georgia were obtained from the Georgia Department of Labor's "Labor Resource Information for Affirmative Action Programs (1981)."

school received training. Given these circumstances and the absence of any evidence of discrimination during the license term, we find that the licensee's EEO performance is sufficiently affirmative to justify an unconditional renewal, although we caution it to continue its efforts, especially with regard to the upper-four job categories.

(b) WKAB-TV, Montgomery.

The station's most recent license term employment report indicates that Blacks comprise 21.2% of the overall full-time staff and 16.7% of that staff in the upper-four job categories. These figures are within the processing criteria. Further, although the station's prior license term employment reports reveal smaller numbers of Blacks in upper-level jobs, it appears that the station's 1982 profile is the result of a positive continuing EEO program. Specifically, the licensee reports that it has obtained referrals from two colleges with substantial minority enrollment and that it uniformly trains inexperienced personnel to assume positions with significant responsibilities. As a result of these efforts, the station reports that two of 11 persons hired during the period July 1, 1980 to June 30, 1981 were Black, and that two Blacks were promoted to Production Photographer and Assistant Film Director. Moreover, subsequent to the filing of the station's renewal application, a Black was promoted to Office Manager while another was training for the position of Audio-Visual Director. Finally, the licensee states that because it has not been able to fill many positions with experienced minority personnel, it plans to continue its training efforts as well as expand its recruitment sources to include Tuskegee Institute.

(c) WGTV(TV), Athens.

By way of background, the licensee, Georgia Public Telecommunications Commission (GPTC),[7] is also the licensee of eight other noncommercial television stations in the State of Georgia. These stations include WXGA(TV), Waycross; WVAN(TV), Pembroke; WCES(TV), Wrens; WCLP(TV), Chatsworth; WJSP(TV), Warm Springs; WACS(TV), Dawson; WABW(TV), Pelham; and WDCO(TV), Cochran. On September 24, 1981, the then-licensees of the stations, the Regents of the University System of Georgia (Regents), licensee of WGTV(TV), and the Board of Education of the State of Georgia (State Board), licensee of the other eight stations, filed applications to assign the licenses of the nine stations to GPTC. Those applications were granted on November 17, 1981. However, because consummation of the assignments did not occur until January 1982, the Regents prepared and filed the renewal application for WGTV(TV) while the State Board prepared and filed the renewal applications for the other eight stations in November 1981. Subsequent to the consummation of the assignments, GPTC amended each pending application to reflect its status as the applicant. In March 1982, all of GPTC's pending renewal applications, except that for WGTV(TV), were granted by the Commission's staff pursuant to delegated authority.

As GPTC's filings reflect, it operates a state-wide noncommercial broadcast service, which transmits programming simultaneously to each of its nine television stations, including WGTV(TV). Consistent with this method of operation, GPTC maintains in its Atlanta headquarters' office its management, primary program origination facilities, and its production center, while its nine stations, including WGTV(TV), operate as "satellite" facilities. Consequently, the majority of GPTC's employees are located in Atlanta, whereas each of the nine stations has or will have only four or five technical and janitorial employees. In view of the foregoing, the arguments in NBMC's petition, which were based entirely on the employment statistics and hiring record of the prior licensee of WGTV(TV) in light of Athens SMSA labor force data, have been rendered moot.[8]

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[7] GPTC was created by Executive Order of the Governor of Georgia in June 1981 "to coordinate the development and operation of the State's public telecommunications facilities . . .." File No. BALET-810924KR, Exhibit 2.

Review of GPTC's headquarters 1982 Annual Employment Report shows that it employed 73 persons, including 16 (21.9%) women and 17 (23.3%) minorities, and 59 persons in the upper-three job categories, including seven (11.9%) women and ten (13.7%) minorities. As NBMC observes in its reply, that report reflects no Black managers and, when compared with labor force data for the Atlanta SMSA (39.9% women and 19.0% minorities), shows female employment percentages which are outside our processing guidelines. However, as to the former matter, we have repeatedly indicated that the mere absence of protected group members from any one employment category is insufficient to raise a question about a licensee's employment practices.[9] Thus, the absence of Blacks from GPTC's management is insufficient, standing alone, to warrant further Commission action. Further, with regard to the licensee's employment of women, GPTC explains that many of the women noted on prior reports filed by the State Board were not assigned to it because the State's instructional television staff, which was primarily female, was not made part of GPTC. Consequently, GPTC's 1982 percentages of female employment are not indicative of its employment practices since they merely reflect the initial group of people assigned to GPTC. In this regard, we also note that GPTC plans to recruit vigorously and to promote women, and it appears from its program and from its initial report of full-time hires and training activities—three positions filled, two by women and one by a Black, and seven interns, six of whom are women and two of whom are Black—that its efforts have been successful.

(d) WDAK, Columbus/WEIZ(FM), Phenix City.[10]

The Columbus SMSA, which includes Phenix City, Alabama, has 44.7% women and 29.8% minorities (29.4% Blacks) in its labor force. Review of the stations' employment reports reveals that full-time employment of minorities has generally exceeded 50% of parity for all jobs at the station but has generally been less than 50% of parity for upper-four jobs.[11] *See* Appendix. Review of the stations' EEO programs as well as detailed employment reports filed with regard to WDAK[12] indicates that applicant referrals were received from a variety of recruitment sources, with the result that of 48 positions filled during the period October 25, 1979 to November 1, 1981, eight were filled by minorities. Of these eight, six are identified as being full-time and five are reported as hired for positions classified in the upper-four job categories. In addition, during the period between submission of the stations' renewal applications and the end of the license term (April 1, 1982), WDAK reports the hiring of a Black sales worker and a Black as Public Promotion Director.[13]

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[8] In this regard, we note that while the 1981 Annual Employment Report for WGTV(TV) reveals 57 full-time employees, the 1982 report shows 10 and the 1983 report shows only 4.

[9] *Baltimore Metropolitan Broadcast Stations*, 89 F.C.C. 2d 1183, 1187 (1982) (and cases cited therein).

[10] We note initially that these stations serve different, albeit neighboring, communities, that they are licensed to separate but commonly owned corporations, and that they have filed separate Annual Employment Reports. However, review of these reports as well as the stations' nearly identical EEO programs indicates that it is more proper to consider the stations as a unit for EEO purposes rather than as separate entities. In this regard, we note: (1) the stations have operated from a common location for the entire license term; (2) the same person has overall responsibility for the implementation of both EEO programs; and (3) many of the staff, including all sales personnel, appear to perform work for both stations. Accordingly, in analyzing the licensees' employment practices, we have combined the stations' employment figures and EEO program data. *Leflore Broadcasting Co.*, 65 F.C.C. 2d 556, 562 (1977).

[11] The 1982 Annual Employment Report also shows that employment of women in the upper-four job categories is slightly less that 50% of parity.

[12] Station WDAK was under reporting conditions because of questions regarding its EEO performance during the 1976-79 license term. By letter dated October 25,

6. The following stations' EEO records, while not raising a substantial and material question of fact, indicate that remedial actions are needed to ensure that the stations will fully comply with our EEO rule and policies. An analysis of each station's EEO performance follows:

(a) WERC/WKXX(FM), Birmingham.

The Birmingham SMSA labor force includes 38.4% women and 26.0% minorities (25.7% Blacks). The stations' most recent license term employment report (1982 Annual Employment Report) reveals 40 full-time employees, including nine (22.5%) women and five (12.5%) minorities, and 37 employees in the upper-four job categories, including seven (18.9%) women and three (8.1%) minorities. However, the stations' prior license term employment reports show that while the precentages of overall full-time employment of women and minorities have been close to the levels reported in 1982, their percentages in the upper-four job categories have generally been less. *See* Appendix. Review of the stations' EEO program reveals that during the twelve month period preceding the filing of the stations' renewal applications, the licensee sought referrals from a number of sources and that it obtained some from an employment service, four local educational institutions, and two newspapers. The licensee also states that it has an intern program with the Birmingham public schools and that the program has been offered to college students, including "at least a dozen Blacks and women." As a result of the program, two white women were hired as part-time employees in professional positions. Concurrent with these efforts, the licensee's 24 hires during the period October 30, 1980 to October 30, 1981 included six women and four minorities. However, three of the six female hires were for clerical positions while one of the minorities hired filled a clerical position and another filled a part-time service worker position.[14] Finally, during the license term, the licensee

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1979, the Commission required WDAK to submit information concerning job hires, recruitment efforts, and a list of all employees as of August 1, 1980 and November 1, 1981.

[13] By letter dated March 25, 1983, NBMC alleged that in June 1982, the licensees discriminated against a Black salesman by firing him and that it did not make any efforts to recruit minorities with respect to several positions filled during September and October 1982. None of the allegations was supported by affidavit although NBMC did submit a copy of an amendment to an EEOC complaint filed by the fired employee. In response, the licensees noted that the EEOC had terminated action on the employee's complaint on February 22, 1983. Further, the licensees point out that a Black announcer was hired in October 1982, that efforts were made to fill other positions with minorities, and that two Blacks were hired in March 1983 as salespersons. Finally, the licensees submit a copy of a letter dated April 1, 1983 from the Columbus Urban League referencing recruitment efforts made by the stations as well as hires which resulted from Urban League referrals. In our view, the licensees' submission is consistent with our conclusions concerning the stations' license term EEO efforts and clearly refutes NBMC's charges concerning the stations' post-term EEO activities.

[14] In this regard, we note that the licensee states that its efforts to employ and

provided on-the-job training which led to the promotions of three white women to the positions of Research Director, Promotion Director, and Administrative Assistant to the General Manager, while two Blacks received computer training. While there is nothing before us which suggests that the stations have intentionally discriminated against females or Blacks, we are concerned about the stations' employment practices regarding upper-level positions. In particular, we note that the number of women has only recently increased while the number of minorities has remained relatively static. Accordingly, we believe it appropriate to monitor the licensee's performance to ensure that it is fully complying with our EEO rule and policies, and, therefore, reporting conditions will be imposed.

(b) WABB/WABB-FM, Mobile.

The Mobile SMSA labor force includes 26.5% minorities (25.9% Blacks). The stations'[15] license term employment reports show that overall employment of Blacks has decreased from four or 15.4% in 1980 to three or 10.7% in 1982, and upper-level full-time employment of minorities has decreased from three or 14.3% in 1980 to none in 1982. *See* Appendix. Review of the stations' EEO reports[16] and program reveals that during the period October 30, 1979 to November 1, 1981, the stations contacted a variety of local organizations and schools in search of applicants. Although the number of referrals generated by these contacts is not noted, the reports show nine of 32 positions filled by minorities, including three announcer positions (two full-time and one part-time) and one full-time sales position. In our view, the licensee's hiring data show that the stations have endeavored to employ minorities in positions of responsibility intermittently throughout the license term; therefore, a hearing on the licensee's EEO compliance is not warranted. However, given the decreasing presence of minorities on the stations' staff and their absence from full-time upper-level positions, we believe it necessary to continue to monitor the licensee's efforts. In this regard, we note that while the stations' hiring figures for minorities indicate compliance with our EEO rule, all of the stations' upper-level minorities have left. Accordingly, reporting conditions, as modified in paragraph 12, will be continued and will include a report on the date and reason for termination of the stations' employees. In addition, we advise the licensee to furnish, in the future, all information requested in the stations' renewal applications and EEO reports. *Baltimore Metropolitan Broadcast Stations, supra*, at 1192.

(c) WKRG/WKRG-FM, Mobile.

Analyzing the stations' license term employment reports, we find that full-time employment of Blacks has varied between 12.5% and 14.6% overall and their

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recruit women and minorities were adversely affected by a large turnover of employees and because some of its recruitment sources lack formal employment procedures. However, the licensee provides no specific information as to how either of the foregoing factors relates to the stations' employment or hiring figures. Further, the licensee states that a sufficient number of qualified women and minorities are applying for available positions.

[15] Although the stations filed separate employment reports, the licensee filed one EEO program which indicates that personnel decisions are centralized and not made by each station. Accordingly, we have combined the employment reports in analyzing the licensee's profile. *Leflore Broadcasting Co., supra.*

[16] The stations' prior license renewals were subject to EEO reporting conditions because of questions regarding their EEO performance during the 1976-79 license term. By letter dated October 18, 1979, the Commission required the licensee to submit data regarding job hires, details concerning recruiting efforts, and a list of all employees as of August 1, 1980 and November 1, 1981.

representation in the upper-four job categories has increased from one or 3.1% in 1980 to three or 9.1% in 1982.[17] *See* Appendix. Comparison of these figures with Mobile SMSA labor force data reveals that the stations' upper-four employment percentages for minorities are outside the processing criteria. Review of the stations' EEO program reveals that during the twelve months preceding the filing of the stations' renewal applications, the stations received 37 referrals from their recruitment sources as well as numerous unsolicited applications from Black job seekers. The stations also conducted an intern program which led to the hiring of two Black news reporter trainees in 1980 and a Black sales trainee and a Black announcer trainee in early 1982. During the period November 16, 1980 to November 14, 1981, the stations reported hiring 25 persons, of whom four were minorities. Further, during the following five months, the stations' nine hires included three minorities, two of whom are the above-noted trainees hired in early 1982. In light of the above, we find that the licensee's efforts are sufficient to warrant renewal. While the stations' recent efforts demonstrate compliance with our affirmative action requirements, we wish to assure ourselves that the licensee will continue to seek out qualified minorities for positions in the upper-four job categories. Therefore, we shall require at least one detailed employment report.[18]

(d) WGAU/WNGC-FM, Athens.

The Athens SMSA includes 18.1% minorities (17.4% Blacks) in the labor force. Review of the stations' license term Annual Employment Reports shows that minority employment at the stations decreased from two or 9.5% in 1980 to one or 4.8% for the years 1981 and 1982. Further, although the 1980 report lists one minority in an upper-four job, none of the reports lists a Black as a full-time employee in an upper-four job, although the 1981 report does list a Black employed part-time as a professional. Finally, with respect to women, three of the four license term reports reveal percentages less than 50% of parity in the upper-four job categories. *See* Appendix. The licensee's EEO program shows that department heads are instructed to contact eight sources deemed likely to result in female or minority job applicants with respect to every job opening to be filled from outside the stations. Pursuant to this policy, the stations' 24 license term hires included nine women and four minorities.[19] In addition, the licensee reports that it provided training to minority employees with the result that one of four license term promotions went to a Black.[20] In view of the above, the stations' female and minority percentages, as reflected in the licensee's employment reports, are not sufficient to raise a question of discrimination.

Nevertheless, there are troubling aspects to this licensee's performance, which, in our view, warrant the imposition of remedial sanctions. First, only one of the licensee's non-clerical hires was a minority, and he was a trainee who was employed by the stations for less than two months.[21] Second, although virtually none of the applications received from minorities appears to have resulted from the licensee's contacts with the minority organizations, agencies or schools listed by the stations, there is no indication in the EEO program that the licensee proposes to utilize other sources to increase the pool of minority job applicants. Third, the stations' records reflect that the licensee may be reserving the receptionist's position for Blacks. In this regard, we note that the licensee states that in September 1979, a white woman was hired with the understanding that she would be replaced when a qualified Black was found.[22] Although we have no information that a complaint followed this action, we are concerned that the licensee may have misconstrued the intent of our nondiscrimination rule (Section 73.2080(a) of the Commission's Rules). We wish to make clear that particular positions are not to be set aside for any reason that would suggest discrimination. Therefore, in view of the above, we shall require that the licensee submit a revised EEO program which sets forth the steps it proposes to increase the flow of minority job applicants, especially with respect to the upper-four job categories, and we shall impose reporting conditions to monitor the licensee's efforts to implement its program. In addition, we admonish the licensee to review its personnel policies and practices to assure nondiscrimination in all aspects of its operation.[23]

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[17] In addition, the stations' lists of part-time employees for both its renewal and 1982 employment reports include a minority in the professional category.

[18] Should the stations' first report show that the efforts noted above have continued, no further reports will be required. In this regard, we note that the stations' 1983 Annual Employment Report reflects 17.1% minorities overall and 15.6% minorities in upper-four jobs.

[19] Although the licensee lists 25 license term hires, including ten women and five minorities, Exhibit 17 of the licensee's opposition shows that one of those "hires" did not appear for a second interview. Consequently, we have not included her in our analysis of the stations' EEO performance.

[20] One other minority noted as having been trained was employed between April and September 1982, subsequent to the close of the license term under review.

(e) WALB-TV, Albany.

The Albany SMSA labor force includes 33.0% minorities (32.3% Blacks). Review of the four license term employment reports reveals that overall full-time employment of minorities (all Blacks) fluctuated from 9.2% (6 of 65) in 1980 to 4.7% (3 of 64) in 1981 to 7.9% (5 of 63) at the filing of the station's renewal application to 6.7% (4 of 60) in 1982, while upper-four employment of minorities went from 5.8% (3 of 52) in 1980 to 0 of 51 in 1981 to 3.6% (2 of 55) at the filing of the station's renewal application to 3.9% (2 of 51) in 1982. None of these figures is within our processing guidelines. In mitigation the licensee reports that nine Blacks left its employ during the license term, including one person who was transferred to the parent company. During the same time period, the station hired seven Blacks, including five for positions in the upper-four job categories. The station's EEO program shows that 17 positions became available during the twelve months preceding the filing of the station's renewal application and that three of the aforementioned Blacks were hired then. Recruitment sources specializing in the referral of Black applicants are listed in the program; however, the Urban League and Albany State College reportedly did not refer anyone. In this regard, the station acknowledged having difficulties recruiting Blacks, and it promised to increase its search for applicants. In addition, it pointed to the promotion of a Black cameraman to Studio Manager.

By amendment filed February 3, 1982, the station informed the Commission that it was expanding its list of recruitment sources to include Florida State, Florida A & M, Morris Brown College, and Valdosta State College, and it attached a copy of a letter that was sent to each as well as one sent to Albany State and Albany Junior College. The letters requested that students be advised that the station was an EEO employer and that applications from them would be welcome. Further, in its opposition, the licensee states that it sent letters to three other schools, and that it contacted its regular recruitment sources as well as three new sources and placed advertisements in *Broadcasting* magazine and the local newspaper with respect to two jobs which became available in January 1982.[24]

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[21] Although the licensee claims that it made offers of employment for upper-level jobs to four other minorities, our review of the stations' lists of applications received discloses only one such offer, which was made in April 1979.

[22] According to the licensee's records, the white woman was replaced by a Black in November 1979.

[23] We also advise the licensee that the instructions accompanying the Annual Employment Report state that a payroll period in January, February, or March is to be used and that the same payroll period is to be used for each year's report.

The licensee's EEO performance indicates that it is willing to hire, train, and promote minorities. Hence, we do not believe that the low levels of minority employment throughout the 1979–1982 license term resulted from discrimination. At the same time, however, we think that the licensee's efforts to affirmatively recruit minority job applicants were inadequate, notwithstanding its contributions to Albany State.[25] In this regard, we note that the licensee failed to take any significant step during the license term[26] to expand the pool of qualified Black applicants despite the station's small number of Black employees and their near absence from the station's upper-level jobs. Accordingly, we shall defer grant of the station's application pending receipt of a revised EEO program which sets forth goals and timetables for minority hiring for the next two years. These goals are to be numerical objectives fixed realistically, stating the number of job opportunities anticipated between now and June 1, 1985. The projected hiring goals should be the maximum that can be achieved by taking positive steps to attract as many minority applicants for each opening as possible. Upon our approval of the goals submitted by the licensee, we shall grant renewal for the remainder of the license term. Finally, we shall impose reporting conditions in order to monitor the licensee's progress.[27]

7. Accordingly, IT IS ORDERED, That the petition to deny filed by the National Black Media Coalition IS DISMISSED; and when considered as an informal objection IS DENIED.

8. IT IS FURTHER ORDERED, That the license renewal appli-

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[24] In its opposition, the licensee states that its parent corporation had contributed broadcast equipment and money to Albany State but that it was recently informed that there were few available Black recruits there.

[25] We also note that the licensee argues that its assistance to the licensee of WTSG(TV), whose president is Black, should be considered. However, in our view, the licensee's assistance has no relevance to its EEO performance, especially since it appears that it was given to avoid the adverse financial effects which would have followed a forced sale of either its newspaper interests or television station as a consequence of the Commission's policy regarding newspaper-broadcast crossownership. *See Newspaper-Broadcast Cross Ownership*, 77 F.C.C. 2d 54, 57-59 (1980).

Similarly, we do not believe that the station's list of programs of special interest to the Black community nor its description of its ascertainment efforts undercuts our conclusion that the station's EEO efforts were not satisfactory.

[26] The licensee amended the station's renewal application on November 10, 1982 and February 14, 1983 to reflect the commencement of an internship program with Albany State. While such a program may ultimately provide a steady flow of qualified Black job applicants, we do not believe that its existence obviates the need for any further remedial action. In any event, in accordance with *Rust Communications Group, Inc.*, 73 F.C.C. 2d 39 (1979), we have concluded that consideration of this post-term effort is inappropriate in view of the lack of an effective license-term affirmative action program.

[27] We also advise the licensee that the instructions accompanying the Annual Employment Report state that a payroll period in January, February, or March is to be used and that the same payroll period is to be used for each year's report.

cations for Stations WHHY, WHHY(FM), WKAB(TV), WGTV(TV), WDAK, and WEIZ(FM) ARE GRANTED.

9. IT IS FURTHER ORDERED, That the license renewal application for WALB-TV IS DEFERRED pending receipt, within 30 days of the release of this Order of an original and one copy of an amended EEO program which includes prospective hiring goals, along with a detailed statement explaining why the goals are reasonable, as well as a timetable to achieve them. Upon receipt of acceptable employment goals, the license renewal application shall be granted by the Mass Media Bureau, pursuant to delegated authority, for the remainder of the license term.

11. IT IS FURTHER ORDERED, that the licensee of Stations WGAU/WNGC-FM submit within 30 days of the release of this Order an original and one copy of an amended EEO program, specifying the steps it proposes to take to increase the number of applications received from minorities.

12. IT IS FURTHER ORDERED, that the licensees of Stations WERC/WKXX(FM), WABB/WABB-FM, WKRG/WKRG-FM, WGAU/WNGC-FM, and WALB-TV submit an original and one copy of the following information thirty days from the release of this Order. In addition, each licensee except that of WABB/WABB-FM is directed to file the same information for two years thereafter with the second and third reports being due on August 15, 1984 and August 15, 1985. In the case of WABB/WABB-FM, the licensee is directed to submit its reports every six months—on February 15, 1984, August 15, 1984, February 15, 1985 and August 15, 1985:[28]

(a) a list of all persons hired as well as all persons who applied for each position filled during the twelve months preceding August 1 (in the case of WABB/WABB-FM, during the twelve months preceding August 1, 1983 and during the six months preceding February 1, 1984, August 1, 1984, February 1, 1985 and August 1, 1985), indicating their referral or recruitment source, job title, part-time or full-time status, date of hire, sex and race or national origin;

(b) a list of all employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), date of hire, sex and race or national origin;

(c) a narrative statement detailing the stations' efforts to recruit for each position filled during the specified periods, including identification of sources used for the purpose of increasing the station's pool of minority applicants (and female applicants in the case of WERC/WKXX(FM);)

(d) a list of all promotions during the specified periods, showing the former and subsequent positions, date of promotion, and sex and race or national origin of the person promoted; and

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[28] Upon submission of the final report, the Commission shall review the licensees' EEO performance, and if we determine that the licensee has developed an effective EEO program, no further reports will be required. However, as noted in *supra* n.18, the licensee of WKRG/WKRG-FM need file only one report if the first report shows that the stations' EEO program has continued to be effective.

(e) in the case of WABB/WABB-FM only, a list of all terminations during the specified periods, showing the date of and reason for termination, and the sex and race or national origin of the person terminating employ. In order to protect the privacy of the persons listed herein, the licensee is directed *not* to include the names of the persons listed.

13. IT IS FURTHER ORDERED, That the Mass Media Bureau send by Certified Mail - Return Receipt Requested a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.[29]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX[1]

		Overall			*Top Four Categories*	
Station	*Total*	*Women*	*Minorities*	*Total*	*Women*	*Minorities*
WHHY/WHHY-FM						
1982	28	6 (21.4)	4 (14.3)	28	6 (21.4)	4 (14.3)
Ren. App.	27	7 (25.9)	4 (14.8)	26	6 (23.1)	3 (11.5)
1981	24	8 (33.3)	3 (12.5)	23	7 (30.4)	2 (8.7)
1980	33	13 (39.4)	4 (12.1)	30	10 (33.3)	2 (6.7)
50% and 50% of SMSA parity		21.3%	15.3%		21.3%	15.3%
WKAB-TV						
1982	33	12 (36.4)	7 (21.2)	30	9 (30.0)	5 (16.7)
Ren. App.[2]	33	11 (33.3)	7 (21.2)	29	8 (27.6)	4 (13.8)
1981[2]	31	9 (29.0)	5 (16.1)	26	5 (19.2)	2 (7.7)
1980	30	6 (20.0)	4 (13.3)	26	3 (11.5)	2 (7.7)
50% and 50% of SMSA parity		21.3%	15.3%		21.3%	15.3%
WDAK/WEIZ(FM)						
1982	30	10 (33.3)	4 (13.3)	24	5 (20.8)	3 (12.5)
Ren. App.	31	12 (38.7)	6 (19.4)	25	9 (36.0)	3 (12.0)
1981	31	12 (38.7)	5 (16.1)	25	7 (28.0)	2 (8.0)
1980	26	10 (38.5)	6 (23.1)	20	6 (30.0)	3 (15.0)
50% and 50% of SMSA parity		22.4%	14.9%		22.4%	14.9%

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[29] The affected licensees may contact Mr. Glenn Wolfe (202–632–7069) of the EEO Branch of the Mass Media Bureau's Enforcement Division for information on the formulation of hiring goals and employment reports. In this regard, we wish to advise the licensees that they need *not* submit the names of the persons referenced in their reports; as indicated in paragraph 12, thee positions of the persons employed, hired and promoted will suffice.

[1] As explained in the text of the Order (para. 5(c)), the statistics of WGTV(TV) are irrelevant, and, therefore, we have omitted them.

[2] In its opposition, the licensee stated that a Black female employee was inadvertently misclassified as a clerical, whereas she should have been classified in the technicians category.

Station	Total	Overall Women	Minorities	Top Four Categories Total	Women	Minorities
WERC/WKXX(FM)						
1982	40	9 (22.5)	5 (12.5)	37	7 (18.9)	3 (8.1)
Ren. App.	42	7 (16.7)	5 (11.9)	38	4 (10.5)	2 (5.3)
1981	44	8 (18.2)	6 (13.6)	40	5 (12.5)	3 (7.5)
1980	44	8 (18.2)	6 (13.6)	38	3 (7.9)	3 (7.9)
50% and 50% of SMSA parity		19.2%	13.0%		19.2%	13.0%
WABB/WABB-FM						
1982[3]	28	11 (39.3)	3 (10.7)	22	5 (22.7)	0 (0)
Ren. App.[3]	24	10 (41.7)	4 (16.7)	19	6 (31.6)	1 (5.3)
1981	25	11 (44.0)	3 (12.0)	20	6 (30.0)	1 (5.0)
1980	26	11 (42.3)	4 (15.4)	21	6 (28.6)	3 (14.3)
50% and 50% of SMSA parity		18.5%	13.3%		18.5%	13.3%
WKRG/WKRG-FM						
1982[3]	38	13 (34.2)	5 (13.2)	33	9 (27.3)	3 (9.1)
Ren. App.[3]	40	14 (35.0)	5 (12.5)	33	9 (27.3)	2 (6.1)
1981	41	16 (39.0)	6 (14.6)	33	11 (33.3)	2 (6.1)
1980	40	15 (37.5)	5 (12.5)	32	9 (28.1)	1 (3.1)
50% and 50% of SMSA parity		18.5%	13.3%		18.5%	13.3%
WGAU/WNGC-FM						
1982	21	6 (28.6)	1 (4.8)	18	3 (16.7)	0 (0)
Ren. App.	21	7 (33.3)	1 (4.8)	18	4 (22.2)	0 (0)
1981[3]	21	6 (28.6)	1 (4.8)	17	2 (11.8)	0 (0)
1980[4]	21	5 (23.8)	2 (9.5)	18	2 (11.1)	1 (5.5)
50% and 50% of SMSA parity		20.4%	9.1%		20.4%	9.1%
WALB-TV						
1982	60	21 (35.0)	4 (6.7)	51	16 (31.4)	2 (3.9)
Ren. App.	63	24 (38.1)	5 (7.9)	55	19 (34.5)	2 (3.6)
1981	64	24 (37.5)	3 (4.7)	51	17 (33.3)	0 (0)
1980	65	24 (36.9)	6 (9.2)	52	18 (34.6)	3 (5.8)
50% and 50% of SMSA parity		21.6%	16.5%		21.6%	16.5%

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[3] One of the stations' part-time professionals was Black.

[4] The station listed an American Indian in the technicians category.

Amateur Operator, Examination
Amateur Operators, Licensing of
Amateur Radio Service
Examination

Parts 0, 1, and 97 are amended to allow the Commission to accept the voluntary and uncompensated services of amateur radio operators and amateur radio organizations to prepare and administer amateur radio operator examinations.
–Amateur Radio Service
PR Docket No. 83-27

FCC 83–433

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Parts 0, 1, and 97 of the Commission's Rules to allow the use of volunteers to prepare and administer operator examinations in the Amateur Radio Service.	PR Docket No. 83-27 RM-4229

REPORT AND ORDER

(Adopted: September 22, 1983; Released: September 29, 1983)

BY THE COMMISSION:

I. *Introduction*

1. In a *Notice of Proposed Rule Making* (*Notice*) in this proceeding, 48 Fed. Reg. 8090 (February 25, 1983), we proposed to accept the use of volunteers in the Amateur Radio Service for the preparation and administration of examinations for all classes of amateur radio operator licenses.

II. *Background*

2. On September 13, 1982, Congress enacted legislation (Public Law 97-259) amending the Communications Act of 1934, as amended. Specifically, Congress amended 47 U.S.C. §154(f) to add a new paragraph 4, which states, in pertinent part:

> "(4)(A) The Commission, for purposes of preparing any examination for an amateur station operator license, may accept and employ the voluntary and uncompensated services of any individual who holds an amateur station operator license of a higher class than the class license for which the examination is being prepared. In the case of examinations for the highest class of amateur station

> operator license, the Commission may accept and employ such services of any individual who holds such class of license.
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> (B) The Commission, for purposes of administering any examination for an amateur station operator license, may accept and employ the voluntary and uncompensated services of any individual who holds an amateur station operator license of a higher class than the class license for which the examination is being conducted. In the case of examination for the highest class of amateur station operator license, the Commission may accept and employ such services of any individual who holds such class of license. Any person who owns a significant interest in, or is an employee of, any company or other entity which is engaged in the manufacture or distribution of equipment used in connection with amateur radio transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur station operator licenses, shall not be eligible to render any service under this paragraph.

3. On October 22, 1982, the American Radio Relay League, Incorporated (ARRL) filed a Petition for Rule Making requesting the issuance of a Notice of Proposed Rule Making to implement those portions of Public Law 97-259 "which authorize the Commission to accept and employ the voluntary and uncompensated services of certain Amateur Radio Service licensees to prepare and administer examinations for applicants for licenses in the Amateur Radio Service."

4. On February 8, 1983, we released a *Notice* in this proceeding proposing, essentially, the ARRL proposal. We proposed to accept the voluntary and uncompensated services of volunteer individuals and organizations in preparation and administration of examinations for amateur radio operator licenses above the Novice Class. (We already have a Novice Class volunteer examiner program.)

III. *The Proposal*

5. We proposed to use examination questions which had been submitted to us by interested amateur radio operator licensees and amateur radio organizations. These questions would be reviewed and, if acceptable, used to create pools of questions. Those pools of questions would then be published by the FCC as part of periodically updated lists of possible examination questions for each license written examination element. The FCC would then, from time to time, randomly select the appropriate number of questions for each subject of examination for each examination element from the lists of published questions and tell the Volunteer Examiner Coordinators (VEC's) which questions were selected for the current examinations. This would constitute the FCC's function of "designing" the examinations. The FCC and VEC's would keep the makeup of current examinations as privileged information.

6. The *Notice* also proposed that VEC's would assemble, print and distribute current examinations. VEC's would accredit volunteer examiners. Three volunteer examiners, with a team chief qualified as an Amateur Extra Class operator, would actually

administer any given examination. VEC's would coordinate the dates and times for scheduling examinations. Upon completion of an examination, the examiners would grade the test papers, and forward the application and test papers of successful candidates to the appropriate VEC. The VEC would then screen the application for completeness and authenticity; make a record of the date and place of the test, the names of the volunteer examiners and candidates involved in that test, test results and related information; issue a successful examination candidate a certificate to verify that the candidate passed the examination(s); and forward the application to the FCC for processing.

IV. *Summary of Comments*

7. We received more than one hundred comments in response to the *Notice* in this proceeding. They were split almost evenly on whether or not to adopt a volunteer examiner proposal of the type set forth in the *Notice*. In addition to the comments of many interested individuals, there were comments and/or reply comments from the following organizations: Ameco Publishing Corp., the American Radio Relay League (ARRL), Bash Educational Services, Inc. (Bash), the Capitol Hill Amateur Radio Society (CHARS), the Emerson Electric Amateur Club, the Milwaukee Radio Amateur Club, Inc., the Nashua Area Radio Club, Inc., the Quarter Century Wireless Association (QCWA), the Schenectady Amateur Radio Association, Inc., the Sociedad Internacional de Radio Aficionados, Inc. (SIRA), Sonoma County Radio Amateurs, Inc., the Southern California Repeater and Remote Base Association (SCRRBA), and Westlink Radio Network (Comments by William M. Pasternak, Network Director).

8. The comments in favor of the proposal cited a need for additional examinations, particularly in areas remote from FCC offices, as the primary basis for their support. The comments opposed to the proposal feared degradation of the service due to fraud or abuse in a volunteer examination program, objected to the control private VEC's would have over the program, and endorsed continued use of FCC examinations supported by amateur user or licensing fees instead. There were many comments dealing with specific issues. These comments and issues are more fully addressed in the discussion that follows.

V. *Summary of Decision*

9. For the reasons set forth in the discussion below, we have decided to proceed with a program to accept the voluntary and uncompensated services of volunteers in the preparation and administration of examinations for amateur radio operator licenses above the Novice Class. This action will result in work being done by volunteers in the private sector which has heretofore been done by

government employees. We will retain the procedures we recently adopted for the use of volunteers in the preparation and administration of examinations for the Novice Class amateur radio operator license. *See Report and Order*, PR Docket No. 82-727, FCC 83-297 (July 12, 1983). For amateur radio operator licenses above the Novice Class, we are adopting a volunteer program similar to the program we proposed, but with some modifications.

VI. *Discussion*

A. *Volunteer Examiners.*

10. Generally, the comments regarding the proposed use of volunteer examiners fell into the following categories: (1) whether three examiners were needed, and whether the use of three examiners was overly burdensome for candidates in remote areas; (2) whether there will be enough volunteers; (3) how the statute's conflict-of-interest provisions affect volunteer examiners; (4) whether examiners may charge money for their services; (5) whether examiners should be required to make public announcements of examinations; (6) whether the code test guidelines for examiners in the proposed rules were sufficient; (7) what procedures examiners should follow for candidates who fail examinations; and (8) whether the rules should provide explicit sanctions for fraud or abuse by volunteer examiners.

1. *Number of examiners per session.*

11. In the *Notice* we proposed that three examiners would be required for each test session, with one of their number required to be the "team chief" and an Amateur Extra Class licensee. Many comments, including those of Bash and the American Radio Relay League (ARRL), indicated a preference for an exception to this rule for candidates in remote areas. Bash also stated his view that requiring three Amateur Extra class licensees for Elements 4(A) and 4(B) is impractical.

12. The use of three examiners provides for cross-checking to assure the correctness of answers to examination questions, to assure proper completion of license applications, and to minimize the likelihood of any possible fraud or abuse.

13. As a result, we are not inclined to make any exception to this rule for candidates in remote areas. However, in an effort to accommodate these candidates to the greatest extent possible within the context of a three-examiner rule, we are eliminating the requirement that in every case one of the three examiners must be an Amateur Extra Class licensee (even where it is not statutorily mandated). Thus, in the case of Element 3, the most widely taken written examination above Novice Class, we will permit an examination team of three Advanced Class licensees.

14. The statute requires that examinations for each class of amateur radio operator license must be administered by a licensee of the next higher class. We construe the statute to require that an examiner administering a telegraphy element must have passed the next highest telegraphy element (if one exists), and that an examiner administering a written element must have passed the next highest written element (if one exists). If a higher element does not exist, then the examiner must have passed the element being administered. Therefore, Elements 1(B), 1(C), 4(A) and 4(B) must be administered by a team of three Amateur Extra Class licensees.

15. The ARRL commented that rather than requiring team chiefs to keep examination answer sheets, we should have Volunteer Examiner-Coordinators (VEC's) act as their repository to allow VEC's to more fully discharge their function of reviewing the suitability of questions. We agree, and we have made this change in the rules we are adopting. With the elimination of this function, "team chief" would no longer have any specified duties separate and apart from the other examiners. We are therefore deleting the concept of a "team chief" from the rules.

2. *Will there be enough volunteer examiners?*

16. By extrapolating a 1-2% ratio of volunteers to licensees, Bash concludes that the number of volunteer examiners will be inadequate. Bash does not explain the genesis or justification of the conclusion that only 1-2% of amateur licensees would be volunteer examiners. But the ARRL pointed out in its *Reply Comments*, at 9, that the history of voluntarism is most outstanding in amateur radio, particularly when one considers that "*tens of thousands* have risen to meet the needs of the Novice Class licensing program, which has made *exclusive* use of volunteer examiners." *ARRL Reply Comments*, at 9.

17. We anticipate no shortage of volunteer examiners. As the ARRL indicated in its *Reply Comments*, at 10-11, thousands of amateur radio clubs meet regularly nationwide, and a crowded calendar of hamfests and conventions spans the entire year. These occasions have been the sites of large-scale examinations in the past, including an FCC-supervised trial run of the proposed program in Dayton, Ohio this past Spring. We expect that such forums will play a significant and consistent role in providing opportunities for large numbers of willing volunteers to step forward and assist others in the amateur community seeking to advance themselves.

3. *Conflict-of-interest provisions.*

18. The SCRRBA commented that the statutory conflict-of-interest provisions relative to examination administration should not be applied to volunteer examiners to the extent that they are employees of general electronics firms making parts (e.g. capacitors) usable in

amateur radio equipment or to employees of publishers of books in fields indirectly related to amateur radio, such as mathematics and science books. The ARRL sought clarification on whether membership in the ARRL would constitute a conflict of interest for volunteer examiners.

19. The conflict of interest provisions of 47 U.S.C. §154(f)(4)(B), prohibiting employees of manufacturers or distributors "of equipment used in connection with amateur radio transmissions," does not appear to apply to an employee of a firm that manufactures electrical parts for many purposes. Rather, it appears intended to apply to firms that manufacture or distribute equipment intended primarily for use by amateur radio operators. In applying and enforcing the conflict-of-interest provisions of this law as applied in our rules, we will use this standard.

20. Additionally, we note that the ARRL, in its *Comments*, sought to draw a distinction between employees of large manufacturers in a division producing amateur radio equipment and other employees of different divisions of the same manufacturers. The ARRL contended that volunteer examiner conflict-of-interest constraints should only apply to employees in the division producing amateur radio equipment. We agree. We will accept the services of volunteer examiners for examination administration from such manufacturers where the employee can demonstrate that he/she does not normally communicate with the division which produces amateur radio equipment.

21. The conflict of interest provisions for those administering volunteer examinations as they apply to persons who own a significant interest in, or are employees of, companies manufacturing or distributing publications "used in preparation for obtaining amateur station licenses" would not appear to exclude prospective volunteer examiners employed by companies publishing mathematics or science textbooks of general applicability. Rather, it appears intended to apply to companies that manufacture or distribute publications intended primarily for the use of candidates preparing for amateur radio operator examinations.

22. Finally, membership in the ARRL or any other similar amateur radio club or organization does not in and of itself create a conflict-of-interest for a prospective volunteer examiner. However, since the ARRL is also engaged in the business of preparing and distributing publications "used in preparation for obtaining amateur station operator license," 47 U.S.C. §154(f)(4)(B), any person owning a significant interest in the ARRL would be prohibited from administering an examination as a volunteer examiner. Any employee engaged in that portion of ARRL's business relating to such publishing would also be prohibited from administering an examination as a volunteer. However, we will accept the services of a volunteer for examination administration from the ARRL where the

employee can demonstrate that he/she does not normally communicate with employees engaged in the ARRL's publishing business.

4. *Fees.*

23. Volunteer examiners will not be permitted to charge for their services. The Communications Amendments Act of 1982 did not authorize the Commission to impose a fee, directly or indirectly, on applicants for amateur radio operator licenses. Moreover, the Act specifically refers to the services of volunteer examiners as "voluntary and uncompensated." 47 U.S.C. §154(f)(4). Therefore, volunteer examiners have no authority to require any remuneration for the preparation or administration of amateur radio operator examinations.

5. *Public announcements.*

24. The ARRL, David B. Popkin (Popkin) and others commented that required public announcement of the examinations would assure broadest candidate participation and the fairest administration of examinations. We agree. We have added rules requiring the volunteer examiners to make public announcement of a forthcoming examination.

6. *Telegraphy examinations.*

25. We received many comments which claimed various insufficiencies in the proposed telegraphy examination test rules. The ARRL and the SCRRBA urged us to conform the new rules as much as possible to present Field Operations Bureau (FOB) telegraphy examination techniques. J.J. Schweder (Schweder), stated in his reply comments that we should reinstate a CW (code) sending examination.

26. We wish to give examiners sufficient latitude to formulate telegraphy examinations within the framework of present rule requirements. Accordingly, we have incorporated all of the present telegraphy examination requirements and guidelines from our present rules. We will allow volunteer examiners the same latitude the present rules allow. Thus, we will accept as valid telegraphy examinations based upon receiving tests, just as we do today.

7. *Procedure in cases of failure.*

27. The ARRL requested in its *Comments* that volunteer examiners be permitted to treat candidates who fail in substantially the same manner the Commission does today, *i.e.*, by informing the candidate of his/her test score and, in the case of volunteer examiners, returning the candidate's application and forwarding test papers to the appropriate VEC. Because this minimizes paperwork and administrative burdens to the examiners and at the same time provides the VEC with valuable data regarding the sufficiency

of questions, we are adopting rules largely in accord with the ARRL's request in this area.

28. Many comments, including those of Popkin, recommended that we retain the provisions of present Section 97.33 requiring a candidate who fails an examination element to wait thirty days before taking the same element again or before taking a higher examination element. Because this requirement is no change from the existing rules and discourages fraud and abuse, we are including it in the rules we are adopting.

8. *Administrative sanctions.*

29. We have added a rule indicating that we will not accept the services of a prospective volunteer examiner whose amateur radio station license has ever been revoked or whose amateur radio operator license has ever been revoked or suspended. We believe that even if we have determined that a person whose amateur station or operator license has previously been revoked or suspended now has the requisite character and other qualifications to be a Commission licensee, that person should not be accepted as a volunteer examiner. A volunteer examiner, by authority of recently enacted law, will stand in the FCC's stead when administering amateur radio operator examinations. This position, by its very nature, demands the highest degree of integrity.

30. We are also adopting a rule specifically authorizing the revocation of the station license and the suspension of the operator license of any volunteer examiner who participates in a fraudulent examination or who accepts payment for preparing or administering an amateur radio operator examination. These sanctions are in addition to applicable existing provisions of Section 303(m)(1)(F) and 312(a)(1) and (4) of the Communications Act of 1934, as amended (47 U.S.C. §§303(m)(1)(F) and 312(a)(1) and (4)), and Section 97.129 of the Commission's Rules (47 C.F.R. §97.129).

B. *Volunteer Examiner - Coordinators (VEC's)*

31. Generally, the comments regarding the proposed use of Volunteer Examiner - Coordinators (VEC's) fell into the following categories: (1) whether VEC's are necessary; (2) whether VEC's are legally sufficient and whether the conflict-of-interest provisions of P.L. 79-252 apply to VEC's; (3) qualifications necessary to be a VEC; (4) whether VEC's may charge for their services; (5) whether VEC's should be required to make public announcement of examinations; (6) whether VEC's should be able to require advance registration for examinations; (7) whether the FCC should be required to provide VEC's with two tests per operator class per month; (8) whether VEC's should keep examination answer sheets; (9) whether volunteer examiners rather than VEC's should authorize instant upgrade

by issuing certificates of successful completion of an examination; and (10) whether VEC's should be regional or national.

1. *Necessity of VEC's.*

32. In the *Comments* and *Reply Comments* of the Capitol Hill Amateur Radio Society (CHARS), VEC's are described as an unnecessary "bureaucratic layer" likely only to add "regulatory burdens" and delay to the licensing process. In its *Reply Comments*, the ARRL characterized the use of VEC's and other regulatory devices in the proposed volunteer examination program as safeguards of the integrity of the system.

33. We also note, as we did in the *Notice*, that such organizations are necessary to accomplish the intent of the legislation; otherwise, rather than coordinating the efforts of our limited number of Field Operations Bureau district offices administering examinations, we would, instead, be expending much greater administrative resources in day-to-day dealings with hundreds or thousands of separate volunteer examiners nationally. We believe that VEC's interposed between the Commission and the volunteer examiners will lend consistency to the program by acting as coordinators of volunteer efforts, by reducing Commission and individual examiner overhead and paperwork burdens, and by screening volunteers and verifying their results. We believe VEC's will more fully accomplish the goal of the legislation—to provide for greater access of the general public to amateur operator examinations. *Notice*, at para. 16.

2. *Legal sufficiency of VEC's and conflicts of interest.*

34. Several commenters have argued that the new statutory provisions do not contemplate or permit the Commission to utilize the services of organizations such as VEC's. We disagree. Although both subsections 4(A) and 4(B) refer to volunteers as "individuals", subsection 4(G) clearly indicates that Congress expected that term to be construed broadly. Subsection 4(G), 47 U.S.C. §154(f)(4)(G) states:

> (G) The Commission, in accepting and employing services of individuals under subparagraphs (A), (B), and (C), shall seek to achieve a broad representation of individuals *and organizations* interested in amateur station operation. (Emphasis added).

Additional references to the use of organizations in any scheme of volunteer examination in the Amateur Radio Service are contained in the legislative history. H.R. Report No. 97-765, 97th Cong., 2d Sess. 29 (1982). Therefore, we conclude that Congress envisioned a role for amateur radio organizations in the process of examination, preparation, administration and monitoring.

35. There may be some organizations with the resources to be VEC's, however, that also have publishing interests. Both AMECO and Bash indicated their view that publishers of materials used in

preparation for obtaining amateur station operator licenses are prohibited from being VEC's by the conflict-of-interest language in subsection 4(B), 47 U.S.C. §154(f)(4)(B). Subsection 4(B)'s conflict-of-interest provision precludes, among other things, any individual involved in the publication or distribution of materials used by individuals in preparation for obtaining amateur station operator licenses from volunteering to administer examinations. Such individuals or organizations would not be precluded from being involved in the preparation of those examinations. See 47 U.S.C. §154(f)(4)(A).

36. The issue thus becomes whether the VEC's would be involved in the "preparation" or "administration" of examinations. However, neither the statute nor its legislative history clearly indicate which activities would constitute administration and which would constitute preparation. It appears from the legislative history that the process of giving the actual examination was considered to be "administration". *See* H.R. Report No. 97–765, 97th Cong., 2d Sess. 29 (1982). The VEC's would not, however, be involved in such activities. Thus, we cannot say with certainty that the activities performed by VEC's are administrative activities contemplated by the conflicts provision. Indeed, it appears that many of the activities performed by the VEC's may be considered as aspects of the preparation of examinations.

37. Nevertheless, in light of the Congressional concerns which prompted enactment of the conflict-of-interest clause in subsection 4(B), we believe some precautions vis-a-vis the publishing activities of VEC's are in order. Congress apparently feared that publishers and distributors of test preparation materials might be inclined to pass those individuals who utilized their materials. Similarly, such entities could assure successful completion of the examination by giving candidates the actual test questions in advance. Accordingly, because VEC's will have access to those questions, and even though we cannot determine with certainty that the VEC's were intended to fall within the purview of 47 U.S.C. §154(f)(4)(B), we are adopting rules to ensure that their activities are consistent with the spirit of the conflict-of-interest provision. Therefore, where an organization seeking to be a VEC also has publishing interests, we will accept its services as a VEC only upon a persuasive showing that preventive measures have been taken to preclude any possible conflict of interest. Such measures could include, but need not be limited to: (1) creation of a subsidiary or sister corporation or organization to act as the VEC; (2) strict prohibition of "cross-line" communications—i.e., publishing employees have no contact or relationship with VEC employees or volunteers; or (3) creation of separate management lines of reporting to assure maximum distance between publishing interests and VEC operations. An organization, seeking to be a VEC, which manufactures or distributes equipment intended primarily for

use by amateur radio operators, may become a VEC only upon a similar showing.

3. *Qualifications.*

38. We have added a new Section 97.507, VEC Qualifications. In this Section we have listed necessary prerequisites for an organization seeking to be a VEC. Many comments stated that we need not require a VEC to be national in scope. The ARRL was of the opposite view. Given our concern that we generate sufficient interest to make the VEC concept viable, we have chosen to change the position we took in the *Notice* where we required VEC's to be national in scope; instead, we will require that VEC's be regional in scope, capable of coordinating volunteer examiner activities in one or more of the regions defined in the new rule.

4. *Fees.*

39. As we discussed above, the Communications Amendments Act of 1982 (P.L. 97–259) did not authorize the Commission to impose a fee, directly or indirectly, on applicants for amateur radio operator licenses. Thus, the Communications Act of 1934, as amended, does not provide any express authorization for the imposition of charges on applicants for amateur radio operator licenses.

40. The ARRL has stated that "for the ARRL to become a VEC, a minimal examination fee to cover necessary out-of-pocket costs of administering the program would first have to be established." *ARRL Reply Comments*, at para. 14. This is not possible. In this *Report and Order* we are, pursuant to Public Law 97–259, delegating our authority to perform a necessary function of this agency, *i.e.*, the preparation and administration of amateur radio operator examinations. Just as we may not collect money for performance of this function, volunteer examiners may not collect money to perform the same delegated function. Nor may VEC's collect money to assist volunteer examiners to perform this delegated function. *See* the *Miscellaneous Receipts Act*, 31 U.S.C. §484 et seq.; *see also* 31 U.S.C. §628 and 18 U.S.C. §209.

41. Finally, most comments opposing this proposal advocated that the FCC retain the examination function and charge fees to cover costs. We have no statutory authority to retain such fees and offset them against operating costs. We are cognizant of the sizable costs a national VEC could incur. This is partly why we have chosen to permit regional VEC's.

5. *Public announcements.*

42. We have already indicated that we agree with those commenters who believed public notice of examinations was desirable. We will require the team of volunteer examiners to publicly announce forthcoming examinations.

43. Additionally, however, we note that many concerns expressed about public notice and its sufficiency derived from the loss of a known central point (the FCC District Office) where people could call to get complete examination information for their area. We believe that having access to such a reference source is an important method of assuring that the public has the capability of becoming fully informed of all examination opportunities in a given geographical area.

44. Accordingly, we are adopting rules to require each VEC to notify local FCC District Offices 30 days in advance of any tests in areas within their jurisdictions.

6. *Advance registration.*

45. The ARRL commented that VEC's should be permitted to establish deadlines to submit applications for examinations. Some cutoff is needed, the ARRL contended, in order to keep costs down while providing reasonable service to applicants and to properly anticipate the size of the examination session for test printing and distribution and other arrangements. We are adopting rules permitting a VEC to require advance registration for these reasons.

7. *FCC test designing.*

46. In its *Comments* the ARRL proposed addition of rules to require the FCC to provide two separate test designs for each class of amateur operator license. For a new program such as this, where it is not easy to predict the number or size of organizations with which we will be dealing as VEC's, such rules would not give us the flexibility we are certain to require. Accordingly, we will not adopt rules mandating a certain number of test designs within specified time frames.

8. *Answer sheets.*

47. As we've already discussed, we are transferring the function of keeping answer sheets from volunteer examiners to VEC's.

9. *Instant upgrade.*

48. The ARRL and Popkin both recommended that the proposed system be amended to eliminate inherent delay in VEC issuance of certificate of successful completion of examination by transferring this function to volunteer examiners to facilitate "instant upgrade." We are adopting rules making this change.

10. *Geographic scope of VEC's.*

49. We proposed to require that VEC's be national in scope. However, commenters like Malcolm C. Mallette and Harry J. Sapp, Jr., indicated a preference for regional or local VEC's to maximize the availability of examination opportunities. In response to these

comments, we are adopting rules requiring that a VEC serve one or more regions which correspond to our present Amateur Radio Service licensing call sign districts.[1] For assignment of call signs we presently divide the United States into thirteen districts with relatively equal populations of amateur radio operators. This concept of call sign districts will be applied to VEC's in order to permit regional coordination of the volunteer examiner program.

C. *Miscellaneous Matters.*

1. *Validity of program.*

50. Henry M. Adelson (Adelson) most succinctly stated the view of many commenters who generally opposed delegation of preparation and administration of amateur radio operator examinations to volunteer examiners. He expressed the view that failure to "afford equal opportunities to all amateurs to take examinations under uniform conditions of time, place and circumstance as would be afforded applicants for the extra class license as well as applicants for other licenses" constitutes a denial of equal protection of the law. Adelson also relied on the general proposition that a federal administrative agency cannot delegate responsibility (such as testing of applicants for a required license) to individual citizens.

51. Under the volunteer examination program as proposed, candidates for every class of amateur operator license above the Novice class will all have access to the same examination system. They will take examinations from volunteer examiners who have been approved by VEC's. The VEC's will be subject to strict standards and will be regulated by the Commission. Most importantly, the written examination elements administered to the candidates will be designed by the FCC and will be uniform throughout the United States. Thus, this equal protection argument is without merit.

52. As to the question of unwarranted delegation of authority, Congress has provided this Commission with specific authorization to accept the services of individuals and organizations in the preparation and administration of amateur radio operator examinations. (P.L. 97-259, enacted September 13, 1982). Any principle of administrative law arguably to the contrary has no applicability in such a circumstance.

2. *Question pools.*

53. As we have indicated, we intend to develop large pools of questions for each license class from which the FCC will design each written examination by choosing a limited number of questions from

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[1] *See* Public Notice No. 3627, *Amateur Radio Station Call Sign Assignment System*, April 15, 1983.

each classes' pool. We proposed to make the pools of available questions public. Mark Everet Siegel (Siegel) and other commenters indicated a preference not to make the questions public, on the basis that this encourages fraud and abuse (presumably through circulation and memorization) and because, these comments argued, publication of the question pools is contrary to the intent of the legislation.

54. The legislative history of P.L. 79-252 speaks to this issue:

> The conferees expect that volunteering individuals and organizations will protect against the premature disclosure to the public of submitted questions. H.R. Report No. 97-765, 97th Cong., 2d Sess. 29 (1982).

From this legislative history, we note that Congress had some concern with regard to premature disclosure of questions. In the examination program we have proposed, the FCC will design each examination by choosing questions from the question pool. Examination designs will be forwarded to the VEC's which will be required to keep the designs confidential. There will be no premature disclosure of the content of any given examination.

55. Additionally, we expect to establish question pools that have as many as ten times the number of examination questions possible for any category in any class of any amateur radio operator examination. As a result, we expect to minimize any possible fraud or abuse that might otherwise occur by revelation of the pools and memorization of the questions in them. As Ray Gustafson commented, the greater the quantity of questions, the harder it is to memorize them all. Moreover, publication of question pools of this size will encourage study for the examination. Any candidate who successfully masters the answers to ten times the number of questions on any given examination for a license class is likely to be well qualified to be licensed for that class. We will, therefore, make the pools of available questions public.

3. *Novice Class examinations.*

56. We are retaining the essential elements of the Novice Class volunteer program which became effective on August 31, 1983. If an unlicensed candidate applies for an amateur radio operator license above the Novice Class, and passes Elements 1(A) and 2 but fails the higher examination elements, we expect one member of the volunteer team (who would also qualify as a volunteer examiner for the Novice Class) to make the appropriate entries on the application form so that the candidate could receive the Novice Class license for which he/she has qualified by passing Elements 1(A) and 2.

4. *Physical disability.*

57. Popkin and others commented that we should retain certain existing rules providing for special examination procedures for

persons with physical disabilities. We have done so in the rules we are adopting herein. Consistent with existing rule interpretations, persons who have a hearing impairment or who have a disability impairing use of their hands are not precluded, for these reasons alone, from taking Elements 1(A), 1(B) or 1(C). However, the need for special examination procedures for the physically handicapped is one of the reasons we have adopted a rule allowing VEC's to require advance registration for examinations to be administered by volunteer examiners.

5. *Conditional Class.*

58. Some commenters indicated that we should reinstitute the Conditional Class license and/or validate licenses of former Conditional Class licensees who did not submit to FCC retesting procedures or who failed them. The rules we are adopting in this *Report and Order* have no relationship to the former Conditional Class licensing program. We do not intend to reinstitute the Conditional Class license or to revisit our actions taken in relation to the Conditional Class licensing program.

6. *FCC testing.*

59. In order to insure the integrity of the examination program for amateur radio operator licenses the FCC will retain the right to prepare and administer amateur radio operator license examinations itself. Additionally, to guarantee against fraud or abuse in the volunteer examination program the FCC will reserve the right to retest any person who has taken an examination under the volunteer program.

7. *Phase-in.*

60. Of course, the Novice Class volunteer examination program is already in place. We expect to phase in the program we are adopting above the Novice Class by first implementing the use of volunteers to prepare and administer telegraphy examinations and then releasing the pool of questions we will begin to use for Element 3. This will enable volunteers to give the telegraphy examinations for all amateur operator licenses and the written examinations for the Technician Class and General Class amateur radio operator licenses, after the FCC has entered into agreement with organizations to be VEC's. We will issue pools of questions for Elements 4(A) and (B) at a later time.

VII. *Conclusion.*

61. Consistent with the previous discussion, we conclude it serves the public interest, convenience and necessity to accept the voluntary and uncompensated services of individuals and organizations to prepare and administer amateur radio operator examina-

tions. We have constructed a program which we believe will insure the integrity of the Amateur Radio Service by providing a substantial number of safeguards which will prevent fraud or abuse. These include the use of three-volunteer examiner teams, accreditation of volunteer examiners, use of Volunteer Examiner-Coordinators (VEC's), requiring VEC's to enter into (and honor) an agreement with the FCC, and FCC retention of authority to give examinations or to retest licensees previously tested by volunteer examiners.

VIII. *Regulatory Flexibility.*

62. In accordance with Section 605 of the Regulatory Flexibility Act of 1980 (5 U.S.C. §605) the Commission certified in the *Notice* that these rules would not, if promulgated, have a significant economic impact on a substantial number of small entities, because these entities may not use the Amateur Radio Service for commercial purposes (see 47 C.F.R. §97.3(b), and because these rules would have no forseeable impact on manufacturers of Amateur Radio Service equipment. The Chief Counsel for Advocacy of the Small Business Administration has been so notified.

IX. *Ordering Clauses.*

63. Accordingly, it is ordered, effective December 1, 1983, that Parts 0, 1 and 97 of the Commission's Rules (47 C.F.R. Parts 0, 1 and 97) are amended as shown in the Appendix attached hereto. The authority for this action is found in Sections 4(i) and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) and 303.

64. It is further ordered that the Commission will, at some future date, issue a Public Notice detailing how and under what circumstances an organization may apply to the FCC to become a Volunteer Examiner-Coordinator (VEC).

65. It is further ordered that this proceeding is terminated.

66. For further information concerning this document, contact John J. Borkowski, (202) 632-4964.

Federal Communications Commission
William J. Tricarico, *Secretary*

APPENDIX

Parts 0, 1 and 97 of the Commission's Rules are amended as follows:

1. The Table of Contents for Part 0 is amended as follows:

(a) A new §0.484 entitled "Amateur radio operator examinations." is added.

(b) The title of §0.485 is revised to read: "Commercial radio operator examinations."

* * * * * * *

2. A new Section 0.484 is added to read:

§0.484 Amateur radio operator examinations.

Generally, examinations for amateur radio operator licenses shall be administered at locations and times specified by volunteer examiners. (See §97.26(a)). When the FCC conducts examinations for amateur radio operator licenses, they shall take place at locations and times designated by the FCC.

3. Section 0.485 is revised to read:

§0.485 Commercial radio operator examinations.

Written examinations and International Morse code telegraphy examinations for commercial radio operator licenses are conducted at prescribed intervals or by appointment at locations specified in the Commission's current examination schedule, copies of which are available from any Commission field office or from the FCC, Public Service Division, Field Operations Bureau, FCC, Washington, D.C. 20554.

4. The Table of Contents for Part 1 is amended as follows: the Title of §1.925 is revised to read "Application for special temporary authorization, temporary permit or temporary operating authority."

5. Paragraph (a) of Section 1.912 is revised to read:

§1.912 Where applications are to be filed.

(a) Applications for any class of new or upgraded amateur operator license shall be submitted to the examiners prior to the examination. (See §97.26) The examiners are required to submit the applications of persons passing their respective examinations to the Commission (for Novice Class operator licenses) or to the Volunteer - Examiner Coordinator (for all other amateur operator licenses). All other applications for amateur radio licenses shall be submitted to the Federal Communications Commission, Gettysburg, Pennsylvania 17325. Only one copy of the application is required.

* * * * * * *

6. The title of Section 1.925 and paragraph (e) of Section 1.925 are revised to read:

§1.925 Application for special temporary authorization, temporary permit or temporary operating authority.

* * * * * * *

(e) Upon successful completion of an Amateur Radio Service operator examination, an applicant already licensed in the Amateur Radio Service may operate his/her amateur radio station pending issuance of his/her permanent amateur station and operator licenses by the Commission for a period of 90 days or until issuance of the permanent operator and station licenses, whichever comes first, consistent with the rights and privileges of the higher operating class for which the applicant has passed the appropriate examination element(s), provided that the applicant retains the certificate(s) issued by the examiners for successful completion of the examination element(s) at the station location, and provided that the applicant uses an identifier code provided by a VEC as a suffix to his/her present call sign.

* * * * * * *

7. Section 1.934 is revised to read:

§1.934 Procedure with respect to amateur radio operator license.

Each candidate for an amateur radio license which requires the applicant to pass one or more examination elements must present the examiner(s) with a properly

completed FCC Form 610 prior to the examination. Upon completion of the examination, the examiner(s) will immediately grade the test papers. If the applicant is successful, the examiner(s) will forward the candidate's application to: (1) the Commission's Gettysburg, Pennsylvania facility for an application for a Novice Class operator license, or (2) a Volunteer-Examiner Coordinator (VEC) for all other classes of operator licenses. A VEC will then issue a certificate for successful completion of an amateur radio operator examination, and will forward the application to the Commission's Gettysburg, Pennsylvania facility.

8. The Table of Contents for Part 97 is amended as follows:

(a) A new §97.26 entitled "Examination procedure." is added.

(b) The title of §97.27 is revised to read "Examination preparation."

(c) The title of §97.28 is revised to read "Examination administration."

(d) A new §97.29 entitled "Examination grading." is added.

(e) The title of §97.31 is revised to read "Volunteer examiner requirements."

(f) Section 97.32 and its title are removed.

(g) The Title of §97.33 is revised to read "Volunteer examiner conduct."

(h) A new §97.35 entitled "Temporary operating authority." is added.

(i) A new Subpart I is added, as follows:

Subpart I — Volunteer - Examiner Coordinators

General

§97.501 Purpose.
§97.503 Definitions.
§97.505 Applicability of rules.
§97.507 VEC Qualifications.

Volunteer - Examiner Coordinator Functions

§97.511 Agreement required.
§97.513 Scheduling of examinations.
§97.515 Coordinating volunteer examiners.
§97.517 Written examinations.
§97.519 Examination procedures.
§97.521 Evaluation of questions.
§97.523 Identification of applicants passing examinations.

9. Section 97.11 is revised to read:

§97.11 Application for operator license.

(a) An application (FCC Form 610) for a new operator license, including an application for change in operating privileges, which will require an examination shall be submitted in accordance with the provisions of §97.26.

(b) An application (FCC Form 610) for renewal and/or modification of license when no change in operating privileges is involved shall be submitted to the Commission's office at Gettysburg, Pennsylvania 17325.

10. Paragraph (b) of Section 97.25 is revised to read as follows:

§97.25 Examination credit.

* * * * * * *

(b) A certificate of successful completion of an examination will be issued to applicants who successfully complete an examination element. Upon presentation of this certificate for telegraphy examination elements 1(A), 1(B) or 1(C), examiners shall give the applicant for an amateur radio operator license examination credit for the code speed associated with the previously completed element. For purposes of examination credit, this certificate is valid for a period of one year from the date of its issuance.

* * * * *

11. A new Section 97.26 is added to read:

§97.26 Examination procedure.

(a) Each examination for an amateur radio operator license shall be administered at a location and a time specified by the examiner(s). Public announcement before examinations shall be made for elements 1(B), 1(C), 3, 4(A) and 4(B).

(b) The examiner(s) must be present and observing the candidate throughout the entire examination.

(c) The examiner(s) will be responsible for the proper conduct and necessary supervision during each examination.

(d) Each candidate for an amateur radio license, which requires the applicant to pass one or more examination elements, must present the examiner(s) with a properly completed FCC Form 610 on or before the registration deadline date for those examination sessions for which registration is required; otherwise, applicants shall submit FCC Form 610 at the examination session before the start of the examination(s). In cases where a registration deadline is required, it shall be specified by the VEC that issues the examination papers to the examiner.

(e) The candidate shall comply with the instructions given by the examiner(s). The examiner(s) must immediately terminate the examination upon failure of the candidate to comply with the examiner(s)' instructions.

(f) At the completion of the examination, the candidate shall return all test papers to the examiner(s).

(g) A candidate whose physical disabilities require special procedures to allow participation in examination sessions shall attach a statement to his/her application. For examinations other than Novice Class the statement shall be retained in the files of the VEC that issues the test papers. The statement for Novice Class examinations shall be retained by the examiner for one year. The statement shall include:

(1) a physician's certification indicating the nature of the disability; *AND*

(2) the name(s) of the person(s) taking and transcribing the applicant's dictation of test questions and answers, if such a procedure is necessary.

(h) An applicant who fails an examination element required for an amateur radio operator license shall not apply to be examined for the same or higher examination element within thirty days of the date the examination element was failed.

12. Section 97.27 is revised to read:

§97.27 Examination preparation.

(a) Element 1(A) shall be prepared by the examiner. The preparer must hold an

Amateur Extra, Advanced, or General Class operator license. The test shall be such as to prove the applicant's ability to transmit correctly by hand key and to receive correctly by ear texts in the international Morse code at a rate of not less than five (5) words per minute. (Special procedures may be employed in cases of physical disability. See §97.26(g).) The applicant is responsible for knowing, and may be tested on, the twenty-six letters of the alphabet, the numerals 0-9, the period, the comma, the question mark, AR, SK, BT and DN. (See §97.29(c).)

(b) Elements 1(B) and 1(C) shall be prepared by the examiners or be obtained by the examiners from the VEC. The preparer must hold an Amateur Extra Class license. The test shall be such as to prove the applicant's ability to transmit correctly by hand key and to receive correctly by ear texts in the international Morse code at not less than the prescribed speed. (Special procedures may be employed in cases of physical disability. See §97.26(g).) The applicant is responsible for knowing, and may be tested on, the twenty-six letters of the alphabet, the numerals 0-9, the period, the comma, the question mark, AR, SK, BT and DN. See §97.29(c).)

(c) Element 2 shall be designed by the examiner from PR Bulletin 1035A (latest date of issue), entitled *Questions for the Element 2 Amateur Radio Operator License Examination.*

(d) Elements 3, 4(A) and 4(B) will be designed by the FCC. The FCC will select questions for each test from the appropriate list of questions approved by the Commission (either PR Bulletin 1035B, C, or D, latest date of issue). The FCC will provide each VEC with current examination designs. The VEC is required to hold current examination designs in confidence.

(e) PR Bulletins 1035A, B, and C and D will be composed of questions originated by the FCC and questions submitted by amateur radio operators in accordance with the instructions in the Bulletin. Amateur radio operators holding Amateur Extra Class licenses may submit questions for any written examination element. Amateur radio operators holding Advanced Class licenses may only submit questions for Element 2 and 3. Amateur radio operators holding General Class or Technician Class licenses may only submit questions for Element 2.

13. Section 97.28 is revised to read:

§97.28 Examination administration.

(a) Unless otherwise prescribed by the Commission, each examination for an amateur radio operator license (except the Novice Class operator license) shall be administered by three accredited volunteer examiners. The examiners must hold Amateur Extra Class operator licenses, unless: (1) they are administering telegraphy element 1(A), in which case they may hold Amateur Extra Class, Advanced Class or General Class radio operator licenses, or (2) they are administering written examination elements 2 or 3, in which case they may hold Amateur Extra Class or Advanced Class radio operator licenses.

(b) Unless otherwise prescribed by the Commission, each examination for the Novice Class operator license shall be administered by one volunteer examiner. The examiner does not have to be accredited. The volunteer examiner must hold a current General, Advanced or Amateur Extra Class operator license issued by the Commission.

(c) Upon completion of an examination element, the examiner(s) shall immediately grade the test papers.

(d) When the candidate does not score a passing grade on an examination element, the examiner(s) shall so inform the candidate by providing the percentage of questions answered correctly, and by returning the application (see §97.26) to the candidate. For examinations other than Novice Class examinations, the test papers, including answer sheets, shall be returned to the VEC that issued them. For Novice Class examinations, the test papers, including answer sheets, must be retained as part of the volunteer examiner's station records for one year from the date the examination is administered.

(e) When the candidate scores a passing grade on an examination element, the examiners (except for examinations for the Novice Class operator license) must issue a certificate of successful completion of the examination. This certificate must bear the VEC-issued examination identifier code (see §97.523). This certificate is required for already-licensed applicants operating with privileges of an amateur operator class higher than that of their permanent amateur operator license (See §§1.925(e) and 97.84). Within one year this certificate may also be used for examination credit for elements 1(A), 1(B) or 1(C) (See §97.25).

(f) When the candidate scores a passing grade on all examination elements required for the operator license class sought (see §97.23), the examiners shall certify to the following information on the candidate's application form (see §97.26):

(1) Examiners' names, addresses and amateur radio station call signs;

(2) Examiners' qualifications to administer the examination; (see §97.31); *AND*

(3) Examiners' signed statements that the applicant has passed the required examination elements.

(g) Within ten days of the administration of a successful examination for the Novice Class operator license, the examiner shall submit the candidate's application to: Federal Communications Commission Gettysburg, Pennsylvania 17325

(h) Within ten days of the administration of a successful examination for the Technician, General, Advanced or Amateur Extra Class operator license, the examiners shall submit the successful candidates' applications and all test papers to the VEC that originally issued that test.

(i) The FCC reserves the right, without qualification, to:

(1) administer examinations itself; *OR*

(2) readminister examinations itself or under the supervision of an examiner designated by the FCC, to any person who obtained an operator license through the volunteer examination process.

14. A new Section 97.29 is added to read:

§97.29 Examination grading.

(a) Each examination element shall be graded separately by the examiners.

(b) An applicant passes a written examination if he/she answers at least 74 percent of the questions correctly.

(c) An applicant passes a code element examination if he/she proves his/her ability to transmit correctly by hand key (straight key, or, if supplied by the applicant, any other type of hand operated key such as a semi-automatic or electronic key, but not a keyboard keyer) and to receive correctly by ear texts in the international Morse code at not less than the prescribed speed for one continuous minute during a five-minute test period. Each five characters shall be counted as one word. Each punctuation mark and numeral shall be counted as two characters.

15. Section 97.31 is revised to read:

§97.31 Volunteer examiner requirements.

(a) Each volunteer examiner administering an examination for an amateur radio operator license must:

(i) be at least 18 years of age; *AND*

(ii) not be related to the candidate.

(b) Any person who owns a significant interest in, or is an employee of, any company or other entity which is engaged in the manufacture or distribution of equipment used in connection with amateur radio transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur station operator licenses, is ineligible to be a volunteer examiner for purposes of administering an amateur radio operator examination. However, an employee who can demonstrate that he/she does not normally communicate with that part of an entity engaged in such manufacture or publishing is eligible to be a volunteer examiner.

(c) Each volunteer examiner shall be uncompensated for his/her services.

(d) Each volunteer examiner administering an examination for the Technician, General, Advanced or Amateur Extra Class operator license must be accredited by the Volunteer - Examiner Coordinator (see Subpart I).

(e) The FCC will not accept the services of any person seeking to be a volunteer examiner if that person's amateur radio station license or amateur radio station operator's license has ever been revoked or suspended.

16. Section 97.33 is revised to read:

§97.33 Volunteer examiner conduct.

A volunteer examiner who has given or certified examinations fraudulently or for monetary or other consideration is subject to revocation of his/her amateur radio station license and suspension of his/her amateur radio operator license.

17. A new Section 97.35 is added to read:

§97.35 Temporary operating authority.

Upon successful completion of an Amateur Radio Service operator examination, an applicant already licensed in the Amateur Radio Service may operate his/her amateur radio station pending issuance of his/her permanent amateur station and operator licenses by the Commission for a period of 90 days or until issuance of the permanent operator and station licenses, whichever comes first, consistent with the rights and privileges of the higher operating class for which the applicant has passed the appropriate examination(s), provided that the applicant retains the certificate(s) issued by the examiners for successful completion of the examination(s) at the station location, and provided that the applicant uses an identifier code provided by a VEC as a suffix to his/her present call sign.

18. Paragraph (f) of Section 97.84 is revised to read:

§97.84 Station identification.

* * * * * * *

(f) When operating under the temporary operating authority permitted by §1.925(e) with privileges which exceed the privileges of the licensee's permanent operator license, the station must be identified in the following manner:

(1) On radiotelephony, by the transmission of the station call sign, followed by the word "temporary," followed by the identifier code(s) shown on the certificate(s) for successful completion of an amateur radio operator examination.

(2) On radiotelegraphy, by the transmission of the station call sign, followed by the fraction bar DN, followed by the identifier code(s) s own on the certificate(s) for successful completion of an amateur radio operator examination.

* * * * * * *

19. A new Subpart I is added to Part 97 to read, as follows:

SUBPART I—VOLUNTEER - EXAMINER COORDINATORS

General

§97.501 Purpose.

The rules in this subpart are designed to provide for the establishment of volunteer - examiner coordinators to coordinate the efforts of volunteer examiners in preparing and administering examinations for amateur radio operator licenses.

§97.503 Definitions.

For the purpose of this subpart, the following definitions are applicable:

(a) *Volunteer-examiner coordinator* (VEC). An entity which has entered into an agreement with the Federal Communications Commission to coordinate the efforts of volunteer examiners in preparing and administering examinations for amateur radio operator licenses.

(b) *Volunteer examiner*. An amateur radio operator who prepares or administers examinations to applicants for amateur radio operator licenses (see §97.30).

§97.505 Applicability of rules.

These rules apply to each entity that serves as a volunteer examiner coordinator.

§97.507 VEC Qualifications.

In order to be a VEC, an organization must:

(a) Be organized at least partially for the purpose of furthering amateur radio;

(b) Be at least regional in scope, serving one or more of the following regions:

(1) Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island and Vermont;

(2) New Jersey and New York;

(3) Delaware, the District of Columbia, Maryland and Pennsylvania;

(4) Alabama, Florida, Georgia, Kentucky, North Carolina, South Carolina; Tennessee and Virginia;

(5) Arkansas, Louisiana, Mississippi, New Mexico, Oklahoma and Texas;

(6) California;

(7) Arizona, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming;

(8) Michigan, Ohio and West Virginia;

(9) Illinois, Indiana and Wisconsin;

(10) Colorado, Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota and South Dakota;

(11) Alaska;

(12) Carribean Insular areas: Commonwealth of Puerto Rico, United States Virgin Islands (50 islets and cays) and Navassa Island; *AND*

(13) Pacific Insular areas: Hawaii, American Somoa (seven islands), Baker Island, Commonwealth of Northern Mariannas Islands, Guam Island, Howland island, Jarvis Island, Johnston Island (Islets East, Johnston, North and Sand), Kingman Reef, Midway Island (Islets Eastern and Sand), Palmyra Island (more than 50 islets) and Wake Island (Islets Peale, Wake and Wilkes).

(c) Be capable of acting as a VEC in one or more of the regions listed in paragraph (b);

(d) Agree to coordinate all amateur radio operator examination elements for all amateur radio operator license classes;

(e) Agree not to accept any compensation from any source for its services as a VEC; *AND*

(f) Agree to assure that for any examination every candidate qualified under these rules is registered without regard to race, sex, religion, national origin or membership (or lack thereof) in any amateur radio organization.

§97.509 Conflicts of interest.

An entity engaged in the manufacture or distribution of equipment used in connection with amateur radio transmissions, or in the preparation or distribution of any publication used in preparation for obtaining amateur radio station operator licenses may be a VEC only upon a persuasive showing to the Commission that preventive measures have been taken to preclude any possible conflict of interest.

Volunteer-Examiner Coordinator Functions

§97.511 Agreement required.

No entity may serve as a VEC until that entity has entered into a written agreement with the Federal Communications Commission to do so. The VEC must abide by the terms of that agreement.

§97.513 Scheduling of examinations.

A VEC will coordinate the dates and times for scheduling examinations (see §97.26) throughout the areas where communications are regulated by the Federal Communications Commission. A VEC may also coordinate the scheduling of testing opportunities at other places. A VEC shall notify the Engineer-in-Charge of the Field Operations Bureau (FOB) District Office having jurisdiction over the area where an examination is to be held of the time, place and registration requirements for any examination. If no FOB District Office has jurisdiction over the area where an examination is to be held, a VEC shall notify the Chief of the Public Service Division of FOB in Washington, D.C., instead. In either case, this notification must be made at least 30 days in advance of the registration deadline.

§97.515 Coordinating volunteer examiners.

A VEC will accredit amateur radio operators, licensed by the Federal Communications Commission, as volunteer examiners (see §97.30). A VEC will seek to recruit a broad representation of amateur radio operators to be volunteer examiners. A VEC may not discriminate in accrediting volunteer examiners on the basis of race, sex, religion or national origin. A VEC may not refuse to accredit a volunteer on the basis of membership (or lack thereof) in an amateur radio organization. A VEC must not accredit an amateur radio operator volunteering to be an examiner if:

(a) the volunteer examiner does not meet minimum statutory qualifications or minimum qualifications as prescribed by the rules;

(b) the FCC refuses to accept the voluntary and uncompensated services of the volunteer examiner;

(c) the VEC determines that the volunteer is not competent to perform the function for which he/she volunteered; *OR*

(d) the VEC determines that questions of the volunteer's integrity or honesty could compromise the examination(s).

§97.517 Written examinations.

A VEC will assemble, print and distribute written examinations designed by the FCC (see §97.27(d)).

§97.519 Examination procedures.

At the completion of each examination, a VEC will collect the candidates' application forms, answer sheets and test results from the volunteer examiners (see §97.28(h)). A VEC will:

(a) Make a record of the date and place of the test; the names of the volunteer examiners and their qualifications; the names of the candidates; the test results; and, related information.

(b) Screen the application for completeness and authenticity.

(c) Forward the application within ten days of the date of the most recent examination to:

Federal Communications Commission
Licensing Division, Private Radio Bureau
Gettysburg, Pennsylvania 17325

(d) Make available to any authorized FCC representative any requested examination records.

§97.521 Evaluation of questions.

A VEC will be expected to evaluate the clarity and accuracy of examination questions on the basis of experience, and to bring ambiguous or inaccurate questions to the attention of the Commission, with a recommendation on whether to revise the question or to delete the question from the Commission's list of examination questions.

§97.523 Identification of applicants passing examinations.

A VEC must establish a unique identifier code for each testing session. This code must be a slant (/) followed by two letters from one of the following letter groups: WA through WZ, KA through KZ, NA through NZ, or AA through AL. The identifier code must be shown on the certificate for successful completion of an examination. The identifier code(s) applicable must be appended as a suffix to the licensee's call sign

when the licensee operates under temporary authority granted to amateur radio operators who have passed the appropriate examination(s) for a higher class (see §§1.925(e) and 97.84(f)).

Rules, Amendment of
Satellite Communications, Procurement

Report and Order raises minimum dollar amount of procurements subject to the communications satellite procurement regulations from $25,000 to $100,000. Sections 25.151(a) and 25.176(c) amended accordingly.
–Amendment of Part 25
CC Docket No. 83–370

FCC 83–425

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Part 25 of Commission's Rules and Regulations with respect to the procurement of apparatus, equipment, and services required for the establishment and operation of the communications satellite system and satellite terminal stations.	CC Docket No. 83–370 RM 3973

REPORT AND ORDER

(Adopted: September 21, 1983 Released: September 23, 1983)

BY THE COMMISSION:

1. On April 18, 1983, we released a Notice of Proposed Rulemaking (NPRM) in this proceeding in which we tentatively concluded that raising the minimum dollar level of procurements subject to our communications satellite procurement rules from $25,000 to $100,000 would be in the public interest.[1] In response to the NPRM

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[1] Part 25 of the Commission's Rules governs satellite and terminal station procurements. Section 25.151 presently states, in part:

Section 25.151. Scope, purpose and application of this subpart.

The provisions of this subpart govern the administration of Section 201(c)(1) of the Communications Satellite Act of 1962 . . .. This subpart establishes uniform policies and procedures applicable to all procurements except where:

(a) The value of the procurement is less than *$25,000*, except as provided in Section 25.176(c).

Section 25.176(c) presently states:

In addition to complying with the requirements applicable to procurements of comments were filed by the Communications Satellite Corporation (Comsat), RCA Global Communications, Inc. (RCA), and the American Satellite Company (Amsat). Below we summarize the existing communications satellite procurement rules, Comsat's petition for rulemaking, the NPRM, and the comments submitted in this proceeding. We then analyze the filings and reach final conclusions.

2. Part 25 of the Commission's Rules establishes uniform policies and procedures applicable to procurements of $25,000 or more by Comsat for apparatus, equipment, and services required for establishment and operation of the communications satellite system and satellite terminal stations.[2] The $25,000 figure has remained unchanged since its adoption in 1964[3] and was selected to maximize competition in the provision of equipment and services utilized by the satellite system,[4] to insure effective competition in Comsat's procurement practices,[5] to establish a framework of procurement practices in which all entities, particularly small businesses, could fairly participate,[6] and to prevent an unfair competitive advantage accruing to any manufacturing interest who may participate in Comsat's ownership.[7]

3. In its petition for rulemaking Comsat stated that the $25,000 amount for contracts subject to the Commission's Rules was too low and requested the amount be raised to $100,000. Comsat asserted that inflation and the development of the satellite system made the $25,000 cut-off amount obsolete. Comsat further stated that the present figure made far too many transactions subject to an undue burden of paperwork and procedures which were not commensurate with the value of the procurements. In addition to in-house

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$25,000, or more, all parties making procurements shall cooperate with the Small Business Administration to the extent feasible even if the value of the procurement is less than *$25,000*, for the purpose of insuring that small business has an equitable opportunity to participate in all procurements.

[2] Subpart B of Part 25 requires, for example, Comsat to notify the Commission upon selecting a prime contractor. 47 C.F.R. Section 25.162. Comsat may award the proposed contract at any time subsequent to 10 days after the date of filing notification unless within such period either: (a) Comsat voluntarily extends the period; or (b) the Commission notifies Comsat that the notice is defective or the Commission finds that it cannot, without further investigation, determine whether its procurement rules have been complied with. In the latter case, the Commission may issue a public notice inviting comments on the proposed award. 47 C.F.R. Section 25.166. The contract may be awarded unless within thirty days after issuance of the public notice the Commission finds that the procurement rules have not been complied with and so notifies Comsat. 47 C.F.R. Section 25.166(b).

[3] Amendment of Part 25 of the Commission's Rules and Regulations (Communications Satellite Procurement), 1 RR 2d 1611 (1964).

[4] *See* Section 102(c) of the Communications Satellite Act of 1962, 47 U.S.C. Section 701(c).

[5] *See* Section 201(c)(1) of the Communications Satellite Act of 1962, 47 U.S.C. Section 721(c)(1).

[6] 1 RR 2d at 1612–13.

[7] *Id.*

administrative cost savings, Comsat also indicated that a higher cut-off figure for the implementation of the Part 25 procurement procedures would reduce inventories and ease the operations, maintenance and training of personnel, and enhance standardizing the documentation of earth station equipment.

4. In our NPRM we tentatively concluded that the existing $25,000 figure should be raised. We noted that: (a) the $25,000 amount had remained unchanged since its adoption in 1964; (b) several inflation indices justified substantial modification of the cut-off figure; (c) the growth of domestic and international satellite system had created a ready market for earth station equipment in which many buyers and sellers existed; and (d) administrative savings to both Comsat and the Commission would result from raising the cut-off figure. In selecting the figure of $100,000, as proposed by Comsat, we recognized that $25,000 in 1964 dollars was equivalent to $71,193 based upon the GNP Price Deflator, $75,085 based upon the Producer Pricer Index for Machinery and Equipment, and $77,799 based upon the Consumer Price Index. Further, our desire to use a fixed figure which could be used by the industry for several years to come caused us to tentatively conclude that raising the cut-off amount to $100,000 would be desirable. We specifically requested further comments on the indexing scheme proposed by Comsat under which the new cut-off figure would be tied to a price index. This proposal is more fully described below.

5. In its comments Comsat supports our tentative conclusion to raise the minimum dollar level of procurements subject to our regulations from $25,000 to $100,000. Additionally, Comsat supports the inclusion of a self implementing price index in order to eliminate certain inequities and to eliminate future proceedings initiated solely to revise the cut-off figure. Comsat forsees no uncertainty or loss of control in adopting a price index which would be employed on an annual basis. Amsat, which owns two earth stations, also supports our tentative conclusion to raise the cut-off figure to $100,000. Amsat views such a new figure as reasonable in view of the inflation over the last eighteen years. RCA states that the current cut-off figure of $25,000 is unrealistically low and places an undue burden on both the industry and the Commission. RCA recommends that we revamp our procurement notification rules with a view toward their elimination or raising the minimum level for their application to at least $250,000.

Discussion

6. The impact of inflation since 1964 and the development of competition in the supply of satellite and earth station equipment warrant the revision of the minimum dollar level of procurements subject to our procurement rules. Therefore, as more fully explained below, we shall affirm our tentative conclusion and raise the cut-off

amount found in Sections 25.151(a) and 25.176(c) of our Rules from $25,000 to $100,000. We shall not, as also described below, adopt any plan which would mandate adjustment of the minimum dollar level in accordance with changes in the national economy.

7. Our decision here, which is generally supported by all three carriers filing comments, is based on five considerations. First, increases in the Gross National Product Price Deflator, the Producer Price Index for Machinery and Equipment, and the Consumer Price Index for the 1964–1982 period justify raising the cut-off figure to over $70,000. Second, the increased number of suppliers and buyers in this field warrants a relaxation of regulatory oversight and thus an increase in the cut-off figure. We anticipate that the proportion of procurements below the $100,000 figure will be small and, for the most part, cover readily available goods and services. Third, we believe that simplicity and certainty are desirable characteristics for our rules. A specific figure satisfies this goal. A figure which is tied to an index and changes annually is likely to confuse the industry, particularly small businesses. In addition, we believe that a rule that sets dollar limits to determine the applicability of a Commission regulatory program should be under Commission control and not subject to some external factor over which the Commission has no control. A fixed figure can always be revised if necessary through rulemaking procedures. Fourth, there may be little difference in administrative costs between making annual modifications as proposed by Comsat and a periodic rulemaking procedure which is generally noncontroversial. Finally, we desire to establish a figure high enough to be reasonable, usable and fair for a number of years to come. In our judgment a cut-off figure for Sections 25.151(a) and 25.177(c) of $100,000 would appear to satisfy all of the above considerations while creating real administrative savings for both industry and government.[8]

8. ACCORDINGLY, in view of all the above, IT IS ORDERED that Sections 25.151(a) and 25.176(c) are amended to increase the cut-off figure for the applicability of our procurement rules from $25,000 to $100,000, effective October 24, 1983.

9. Pursuant to Section 605(b) of the Regulatory Flexibility Act (P.L. 96–345) IT IS CERTIFIED, that Sections 603 and 604 of the Act do not apply because this rule will not have a significant economic impact on a substantial number of small entities. See 5 U.S.C. Sections 603, 604, 605(b). As stated above, the rule change is in large part an adjustment for inflation and does not alter the intent of the original rule.

10. IT IS FURTHER ORDERED, that the Secretary shall cause a

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[8] The record does not support raising the cut-off figure tenfold to $250,000 or eliminating the procurement rules outright as urged by RCA. Comsat is still a rate base regulated entity and we have on several occasions received requests from suppliers to review or clarify a Comsat procurement decision.

copy of this Report and Order to be published in the Federal Register and shall mail a copy of this Report and Order to the Chief for Advocacy of the Small Business Administration.

11. IT IS FURTHER ORDERED, that this rulemaking proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Common Carrier, Rates, Charges
Notice of Filing
Tariff, Cost Support Material
Tariff, Economic and Financial Data in Support of
Tariff, Filing and Posting of
Tariff, Regulations of

Notice of Proposed Rulemaking adopted to recodify Part 61 of Rules, governing tariffs. Salient changes proposed include reduced notice and cost support requirements for dominant carriers. Entire Part would be rewritten to better tailor formal tariffing requirements to contemporary circumstances in telecommunications. Part 61 implements Section 203 of the Communications Act. (The single change to Part 1 is a simple relocation of a procedural requirement for consistency and ease of reference.)

–*Amendment of Parts 1 & 61*
CC Docket No. 83–992

FCC 83–402

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

Amendment of Parts 1 and 61 of the Commission's Rules	CC Docket No. 83–992

NOTICE OF PROPOSED RULE MAKING

(Adopted: September 9, 1983; Released: October 5, 1983)

BY THE COMMISSION:

1. We propose here a recodification and further revision of Part 61 of the Commission's Rules, 47 C.F.R. §§61.1 *et seq.*, which governs tariffs, and a single related amendment to Part 1. Of particular importance, as explained below at paras. 8–10, we are proposing to reduce from 90 to 45 days the notice period required for dominant carriers' tariff filings which would increase or restructure rates, or introduce new service offerings. Other tariff filings by dominant carriers, which presently require 70 days' notice, would be subject to a 35 day notice requirement under the recodification. In addition, we are proposing (at para. 13) to expand the exemption from the cost support requirements of Section 61.38, so that dominant carriers with annual gross revenues less than $500,000 will not be subject to that requirement. (The present exemption cutoff is $200,000.)

2. Although particular provisions of Part 61 have recently been modified or supplemented to better reflect contemporary industry conditions,[1] our action here represents the first overall review of this part since its original adoption in 1939.[2] As discussed below, we now propose to eliminate unnecessary regulation, to adopt more flexible procedural options to ease carriers' compliance burdens, and generally to clarify and restructure the remaining regulations in Part 61 for easier comprehension.[3] These rules, as streamlined, will enable the Commission to continue to meet its statutory obligations, while allowing more efficient operation and more effective competitive responsiveness by subject carriers.[4]

3. Part 61 provides the procedural framework within which subject carriers must operate when filing tariff publications with the Commission. That framework consists of specific rules and regulations for every tariff, supplement, revised page, additional page, instrument of concurrence, notice of revocation, adoption notice and any other schedule of charges or regulations, which is filed with the Commission pursuant to Section 203 of the Communications Act of 1934. That same structure affords the Commission adequate opportunity to examine tariffs for possibly unjust, unreasonable, or unreasonably discriminatory provisions. These procedures, however, were adopted in an environment dominated by the presence of traditional monopoly telephone and telegraph service suppliers. Although that environment has since undergone radical change brought about by technological revolution, growth in telecommunications demand, and the emergence of a multiplicity of suppliers, our Rules for the most part have not changed. Thus, numerous provisions of our Rules

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[1] Last fall, we eased the Section 61.38 requirement for cost support materials, originally imposed in 1970, to better comport with present industry conditions and related tariffing practices. We eliminated the backcast requirement and shortened the term of forecasts. Amendment of Section 61.38, FCC 82–436, October 8, 1982. See also Tariffs—Evidence (Docket No. 18703), 25 FCC 2d 957 (1970) [adoption of Section 61.38]. Reconsideration of those revisions was denied today in a separate order, FCC 83–399. In addition, we adopted in 1980 distinct procedural schemes for dominant and non-dominant carriers. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof (Docket No. 79–252), 85 FCC 2d 1 (1980), recon. pending (Competitive Carrier Rulemaking).

[2] Rules Governing the Construction, Filing and Posting of Schedules of Charges for Interstate and Foreign Communication Service, 4 Fed. Reg. 2287 (June 7, 1939).

[3] We propose to retain many requirements which prescribe a standard format and notation for tariffs filed with the Commission. Such procedural specification is necessarily detailed; were we to permit differing tariff formats and abbreviations, the interpretation, evaluation and comparison of tariffed service offerings would become substantially more difficult and time-consuming, without any significant offsetting benefits to carriers, customers or Commission staff.

[4] The Appendices set out the proposed recodification side-by-side with the existing text of Part 61, and include indices cross-referencing the old and new texts.

have become outdated or confusing as service offerings and our own regulatory policies have evolved.[5] We are also concerned that certain provisions of Part 61 unnecessarily impede effective competition between carriers.[6] We believe that procedural reform can significantly improve subject carriers' ability to respond promptly and effectively to altered competitive circumstances. Thus, this proceeding seeks both to clarify and update our Part 61 rules, and to facilitate competition by reducing lead time for introducing new services and, to the extent possible, diminishing carrier exposure to the regulatory process.

4. While pursuing these goals, the Commission is aware of its statutory duty to exercise an informed and responsible regulatory oversight to protect the public interest. In our view, the rules we propose continue to provide the tools necessary to fulfill this function. Thus, Part 61 will still afford affected parties the opportunity to address perceived shortcomings in offerings by filing carriers.[7] Moreover, revised Part 61 will still contain sufficiently detailed format specifications to assure that all tariff users can readily make useful comparisons within and between tariffs. Indeed, with the simplification[8] or elimination of many Part 61 requirements that no longer are appropriate in today's environment, the user should find this process significantly less burdensome. In sum, the proposed Part 61 is intended to reform our regulations to retain only those requirements which are necessary for responsible regulatory oversight in accordance with the objectives of the Act.

5. Our proposed rule revisions divide into two categories. The first, larger "recodification" category embraces all rule changes for which we are proposing a specific revised form, including the reorganization and renumbering of Part 61 generally. As such, these changes reflect the Commission's working familiarity with the application of these rules on a day-to-day basis. Included in this

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[5] For example, the rules presently set forth separate requirements for tariffs filed in loose-leaf and pamphlet form, although no pamphlet tariffs have been filed in over a decade. Similarly, the present rules (Sections 61.66 and 61.67) refer to money order services, although this is no longer a tariffed service; there is a similar archaic reference to submarine cables (Section 61.19).

[6] These provisions are discussed below at paras. 8–12.

[7] There would, however, be a shortened period in which to file petitions against filings presently submitted on 90 days notice. The shortened time schedule for these petitions would result from the reduction of that notice period to 45 days, which implicates a different filing schedule. See n. 15, below. Nevertheless, the Commission would retain the option to defer the effective date of a tariff to the full 90 day statutory period, if required, and to similarly extend the schedule for filing petitions.

[8] *E.g.*, Part 61 presently contains detailed and confusing standardized procedures enabling one carrier to concur in another carrier's tariff, and setting forth the procedures required for offerings involving more than one carrier. The proposed recodification still provides for these mechanisms, but in simplified, more easily understood form.

category are the proposed reductions in notice periods routinely imposed on dominant carriers, and expansion of the dominant carriers' limited exemption from cost support requirements. In contrast, the second category involves provisions of Part 61 which we consider due for serious review, but for which our present level of information is inadequate to support specific rule language.

6. We believe that most of the changes in these rules may be implemented without notice and comment rulemaking procedures under the Administrative Procedures Act, and may be made effective sooner than 30 days.[9] Indeed, as part of our internal review of Part 61, we recently moderated without rulemaking the Section 61.38 cost support requirements attached to certain types of tariff filings, because they were no longer necessary or useful for effective tariff review in the context of the contemporary telecommunications marketplace.[10] Nevertheless, these rule changes involve some areas on which we particularly desire public comment before formalizing specific changes. To achieve maximum benefit from a well-coordinated procedural structure, therefore, we are offering the entire recodification for public comment. We believe the recodification will benefit from comments which address the inter-relation of particular provisions (as well as focussing on rules of particular interest); it is precisely this element which has been slighted by past revisions of particular Rules.

7. The major proposals are summarized in the text below. In addition, all specific text changes proposed are set out in full detail in the Appendices. (The Appendices also contain a section-by-section explanation of all the proposed rules, and indices which cross-reference the old and new rule sections.)

Category I: Recodification Revisions

8. *Notice Periods*. Section 203(b) of the Act, as amended in 1976,[11] requires 90 days' notice before proposed tariffs may take effect, but preserves Commission discretion to moderate that period "either in particular circumstances or by general order applicable to special circumstances or conditions." 47 U.S.C. §203(b). That procedural flexibility has long been exercised by applying different notice periods to different types of filings by the same carrier. Thus, the statutory maximum 90-day notice is presently required only of

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[9] Section 553(b)(3)(A) of the Administrative Procedures Act, 5 U.S.C. §553(b)(3)(A), exempts rules involving agency practice and procedure from that Act's notice and comment requirements. Section 553(d)(2) of the Act exempts such rules from the requirement that their effectiveness follow publication by at least 30 days.

[10] Amendment of Section 61.38, *supra* note 1. As discussed there, authority for our characterization of these rules as procedural is well established. Aeronautical Radio, Inc. v FCC, 643 F.2d 1221, 1235 (D.C. Cir. 1980); Associated Press v FCC, 448 F.2d 1095, 1104 (D.C. Cir. 1971).

[11] P.L. 94–376, 90 Stat. 1080, August 8, 1976.

dominant carriers making filings which involve a change in rate structure, a new service offering, or a rate increase. 47 C.F.R. §61.58(b). All other dominant carrier filings, except for minor revisions (*e.g.*, changes in carrier name, change of coordinates, corrections) permitted as 15 day filings under §61.58(a), must be made on 70 days' notice. 47 C.F.R. §61.58(c).[12] For non-dominant carriers, we have established a 14-day notice period for all filings.

9. The 70 or 90 day notice requirement for effecting price changes or new service offerings proposed by dominant carriers both delays the public benefits of the innovation, and gives competitors an extended opportunity to improve their competitive position by fashioning competitive offerings or altering marketing practices. These constraints naturally tend to inhibit dominant carriers' initiatives and their competitive responsiveness, and have resulted in numerous dominant carrier requests for special permission[13] to file tariff proposals on shorter notice than would otherwise be required by the Rules. In many instances, carriers make such requests before tariff proposals are filed. This imposes the burdens of preparing and processing such requests on carriers and the Commission. In other cases, special permission is requested by the carrier only after the tariff has been filed, when no petition to suspend or reject is filed by the filing deadline. This latter situation entails the additional burden of a subsequent filing by the carrier of revised tariff pages specifying the revised effective date. In both contexts, the Bureau often grants special permission to accelerate effective dates, since as a matter of practice the staff will not delay a proposed carrier action longer than is necessary for adequate review.

10. We recognize there are competing considerations in reducing the notice required for filings by dominant carriers. On the one hand, the public would clearly be served by permitting all carriers the maximum latitude to respond quickly and decisively to competitive offerings, new technologies, and new circumstances. On the other hand, we must preserve our ability to perform the Commission's oversight responsibilities under the Act. Our experience suggests that in most cases, dominant carrier filings submitted on 35 or 45 days' notice can be adequately reviewed in these reduced time periods. The existing notice requirements were adopted when most tariff matters had to be referred to the full Commission for decision. Since then, we have substantially expanded the delegated authority of the Chief, Common Carrier Bureau to act in these cases. *Amendment of Part 0 of the Commission's Rules*, FCC 79–880, January 18, 1980. Consequently, in most cases the longer notice

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[12] Part 69 of our Rules, governing access tariffs, requires those tariffs to be submitted on 90 days' notice (§69.3(a)). The provisions of Part 69 are not affected by today's actions.

[13] Sections 61.151–61.153 of our Rules govern special permission requests.

periods necessary to allow for the internal process of preparing agenda items are no longer required for the Bureau to effectuate expeditious tariff review.[14] Moreover, for the relatively small number of filings which may require additional review, we retain the discretion to require the carrier to extend the notice period to the full statutory maximum of 90 days.

11. *Exemption from Section 61.38 Submissions*. The second salient change in Part 61 which we propose today is the expansion of the class of dominant carriers exempt from compliance with Section 61.38. That rule specifies the cost support materials which must be submitted with certain tariff filings. Those materials currently need not be filed by carriers with annual gross revenues under $200,000. 47 C.F.R. §61.38(f). This exemption was originally set at $100,000 and was designed to limit the number of carriers required to file this data, with an eye to moderating the review burden on limited Commission staff.[15] Our experience since then, particularly in recent years, convinces us that the burden on smaller carriers of complying with the requirements of §61.38 outweighs the benefits to the Commission's review process in the usual case. We therefore propose to increase this exemption threshold to $500,000, primarily to ease the burden on affected carriers. Of course, the Commission retains authority to request cost support materials from any carrier where the circumstances of a particular filing warrant.[16] Thus, we expect the higher threshold will substantially mitigate the affected smaller carriers' burden of compliance, without doing violence to statutory oversight functions.

12. *Other Specific Recodification Proposals*. As noted, the recodification is intended to eliminate unnecessary regulation, to adopt more flexible procedural options better comporting with contempo-

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[14] The pleading cycle for petitions and replies addressing 70 day filings would not be affected by the proposed reduction to 35 days' notice. The 25-day petition deadline for what are now 90 day filings would be reduced to the 15 day deadline presently prescribed in Section 1.773 for filings made on 30 to 89 days' notice. Petitioners should in our judgment be able to prepare informed petitions in 15 days. Where more time is needed, the Commission may grant an extension, and defer the tariff's effective date to permit more extended review.

[15] Tariffs-Evidence (Docket No. 18703), 25 FCC 2d 957, 966 (1970), explained the original exemption as necessary "because we envision that the Commission's staff would not be able at this time to evaluate routinely the required information and data if all carriers submitted it." The increase to $200,000 to reflect inflation since 1970 was adopted in Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof (Docket No. 79-252), 85 FCC 2d 1 (1980).

[16] We note that because this rule change is simply a proposal, carriers whose annual gross revenues fall between $200,000 and $500,000 will be required to submit Section 61.38 materials with their access charge filings in October 1983. Because the submission of such data may be particularly useful in this regard, we may continue to require it of those carriers who otherwise would be exempt should the increased threshold be adopted. Commenting parties may wish to address this issue.

rary conditions, and generally to clarify and restructure Part 61 to ease comprehension. A full description of all the changes proposed to achieve these ends would burden this order unnecessarily, but we believe it helpful to describe illustrative revisions proposed as part of the recodification, following their renumbered rule designations. Appendix B cross-references these designations to the existing rules.

13. In the sub-part headed "general rules", proposed Section 61.33 would enumerate for the first time the information which must routinely be submitted with tariff transmittals to aid Commission review. Because the existing rules do not adequately specify these materials, Commission staff frequently must request supplemental information from carriers. Apart from the unnecessary administrative burden on both parties which results, supplemental requests have the potential to delay the effective date of proposed tariffs as well. In addition, proposed Section 61.52 would explicitly authorize the carrier to use an optional form for tariff pages, at its discretion. This optional form is frequently used by carriers now through the staff's routine grant of waiver requests. Furthermore, proposed Section 61.54 would consolidate material now scattered through eight existing rule sections, in order to eliminate redundancies and clarify the specific requirements governing the composition of tariffs. Similarly, proposed Section 61.58 would consolidate existing notice requirements (including the shorter notice periods) presently in six rule sections, and would establish a new three-day notice period for the correction of typographic errors.

14. Under the sub-heading "concurrences," proposed Section 61.131 would formalize the present practice of allowing a carrier to concur in another carrier's tariff, as an alternative to filing a virtually identical tariff on its own behalf. This procedure reduces the burden of tariff preparation for carriers electing it, as well as the burden of administrative review. While currently used primarily by multipoint distribution service carriers, this type of concurrence could also reduce significantly the burdens of submitting and reviewing other tariffs whose terms are suitable for a generic approach.

15. Of the remaining two sub-headings, only that governing the adoption of tariffs by successor carriers has been significantly altered. Proposed Section 61.171 would delete the present requirement that an adoption supplement be filed. This is unnecessarily duplicative of the separate requirement in Section 61.171 that an adoption notice be filed and posted. More importantly, carriers would no longer be permitted to keep original tariff pages on file when the offering carrier changes, a practice that has confused customers and created administrative burdens. Instead, under the proposed procedure, the adopting carrier would reissue the tariff in its entirety under its own name and numbering series immediately on adoption, or be permitted to file an adoption notice provided it

reissues the tariff within the next 15 days. This approach would accord the adopting carrier some procedural flexibility, while still addressing the problems which have accompanied adoptions under existing rules.

16. This leaves one related matter involving our companion rules governing petitions against tariff filings. See 47 C.F.R. §1.773. Currently the rules for petitions against tariff filings of non-dominant carriers are set forth in Part 61, while the rules for petitions against filings by all other carriers are governed by Section 1.773. We believe this creates an unnecessary fragmentation. The recodification would relocate the procedural provisions for non-dominant carriers to Section 1.773(a)(1)(ii). In addition, proposed Section 1.773(b)(1)(iv) would explicitly provide for the filing of consolidated replies by carriers where petitions have been filed on more than one date. At present in such circumstances, the carrier must apply for authority to submit a consolidated reply to all petitions. Offering the carrier this explicit alternative by formal rule will relieve both carriers and the Commission of the burden of submitting and processing such routine authority requests.

Category II: Proposals Not Yet Reduced to Rule Revisions

17. As noted, the second category of proposed rules includes particular areas which we think deserve serious review, but on which we lack sufficient information to base specific proposals. The most significant proposal in this category would diminish the burden of compliance with Section 61.58's requirement that carriers specifically notify customers of proposed rate increases or service discontinuances. This provision reflects the Commission's concern that through effective notice, sufficient time will be available for the public to comment on tariff filings proposing rate increases. *Tariffs-Evidence*, 25 FCC 2d 957, 970–971 (1970). Since adoption of the special notice requirement in 1970, however, it has become clear that different carriers warrant different regulatory treatment. The Commission has recognized that non-dominant carriers, as they lack market power, are constrained by the availability of competitive alternatives to provide service to their customers at reasonable rates, terms and conditions. *Competitive Carrier Rulemaking*, *supra*, note 1. Thus, tariff proposals filed by such carriers are presumed lawful. Since adopting these provisions, our experience has been that fewer than a dozen petitions asserting the unlawfulness of non-dominant carriers' filings are received each year, and all have been found meritless after review. In the much altered contemporary environment, therefore, we believe a more closely circumscribed rule, exempting carriers classified as non-dominant from any customer notification responsibilities under Section 61.58, can provide more flexibility to the carriers while fully effectuating our statutory responsibilities. Given the competitive constraints affect-

ing non-dominant carriers, they can reasonably be expected to voluntarily provide such notice to keep their customers satisfied. Moreover, rate increases and service discontinuances are both constrained and mitigated in their consequences by the presence of alternative offerings, since customers confronted with rate increases or service discontinuances by a non-dominant carrier can reasonably be expected to consider another carrier's service offering. Accordingly, we consider reliance on the marketplace to be a reasonable and less burdensome alternative to requiring customer notification, where tariff proposals from non-dominant carriers are concerned.

18. We also propose to exempt rate increases proposed by dominant carriers from this notice requirement, where the proposed rate revisions involve an insubstantial increase over a 12 month period. We believe that the dominant carriers' filings require this more finely tuned approach rather than outright elimination of the requirement, as the prospect of substantial rate increases or service discontinuances by such carriers may not be so tempered by customer recourse to readily available marketplace alternatives. Nevertheless, existing Commission practice recognizes that notification obligations can impose considerable burdens on such carriers; thus in limited situations the Commission considers newspaper publication of proposed rate increases an appropriate method of compliance.[17] Even this flexible approach to notification, however, still imposes a burden on the carrier which often is unwarranted by the actual impact of the proposed rate increase. Accordingly, we propose to create this limited exception to the dominant carriers' customer notification obligation to distinguish between trivial and significant increases. We believe it may be feasible to designate a specific level of price increases which would not warrant the imposition of the special notification requirement, and we request comment directed to what that level might be. As with any such proposal, we recognize that there are alternative approaches to carving out such an exception, and we invite comments on other ways to delineate the suggested distinction in our rules.

19. Finally, we address the tariff posting requirement (Section 61.72), which obligates subject carriers to post a schedule of rates and regulations to be available for public inspection during regular business hours. Some carriers have suggested informally that few customers currently refer to these posted tariffs. If this is indeed so, we question whether this provision should be eliminated or whether some other method of making information available might be established which would provide more flexibility to carriers while still efficiently serving the public. Because our information in this area is limited, for recodification purposes we have confined our

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[17] This established interpretation of Section 61.58 is made explicit in the recodified text of that rule.

redrafting of §61.72 essentially to a clarification of the existing requirement. However, we urge interested carriers and customers to comment on the appropriateness of the present posting requirement to existing and anticipated operations, so that we may determine if revision is indicated.

20. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. §605(b), we hereby certify that the proposed rule changes, which are largely procedural in nature, will not have a significant economic impact on a substantial number of small entities. The effect of the discrete rule amendments assembled in the recodification will in most instances be a time saving for the carrier or end user in understanding the rule, a related reduction in the risk of inadvertent noncompliance due to confusion or poorly stated regulations, and/or a lessened burden of compliance reflecting the creation of a more flexible regulatory regime. Because these changes are generally in the nature of refinements and clarifications, the restated rules will most directly benefit smaller carriers and more recent entrants, as they do not already have extended experience with tariff administration under the existing rules.

21. All interested persons are invited to file written comments on or before November 14, 1983. Reply comments should be filed on or before November 29, 1983. All relevant and timely comments and reply comments will be considered by the Commission. In reaching its decision, the Commission may take into account information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

22. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation; on the day of oral presentation, that written summary must be served on the

Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. *See generally*, Section 1.1231 of the Commission's Rules, 47 C.F.R. §1.1231.

23. In accordance with the provisions of 47 C.F.R. §1.419(b) an original and six copies of all comments, replies, pleadings, briefs and other documents filed in this proceeding shall be furnished to the Commission. Members of the public who wish to express their views by participating informally may do so by submitting one or more copies of their comments, without regard to form (as long as the docket number is clearly stated in the heading). Copies of all filings will be available for public inspection during regular business hours in the Commission's Docket Reference Room (Room 239) at its headquarters in Washington, D.C. 1919 M Street, N.W.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX A

CROSS INDEX: EXISTING SECTIONS

C	Clarified by renaming, rewriting or expanding
D	Deleted as duplicative, redundant or archaic
N	New
N.C.	Nothing Dropped
R	Relocated and/or renumbered w/o substantial change
S	Substantive change including consolidation

Old §	*New §*	*Description of Action*	*Explanation*
		Part 1	
1.773(a)(1)	1.773(a)(1)(i)		
	1.773(b)(1)(iv)	N	
		Part 61	
		—APPLICATION—	
61.1	61.1(b)	C	
		—DEFINITIONS—	
61.11	61.11	C	
61.12	61.14	Will be C, R	
61.13	61.16	C, R	
61.14	61.12(a)	C, R	
61.15	61.12(b)	C, R	
61.15a(a)	Deleted	D	
61.15a(b)	61.12(d)	C, R	
61.16	61.12(d)	C, R	
61.17	61.72(a)	C, R	
61.18	61.21	C, R	
61.19	Deleted	D	[archaic]

61.20	61.24	C, R	
61.21(a)	61.58(c)(1)(iii)	C, R	
61.21(b)	61.17	C, R	
61.21(c)	61.25	C, R	
61.21(d)	61.58(c)(1)(iii)	C, R	
61.21(e)	61.13	C, R	
61.21(f)	61.18	C, R	
61.21(g)	61.20	C, R	

—NEW SECTIONS—

	61.1(a)	N	[Scope]
	61.12(f)	N	[Other Participating Carrier]
	61.15	N	[Commercial Contractor]
	61.19	N	[Rate]
	61.22	N	[Supplement]
	61.23	N	[Tariff]
	61.26	N	[United States]

—IN GENERAL—

61.31	61.1(b)	R, S	[61.31 now deleted]
61.32	61.32	C, S	
61.33(a)	61.33(a),(c)	C, S	
(b)	(d)		
(c)	(a)		
61.34	Deleted	D	[deleted in earlier revisions]
61.35	61.35		
61.36	61.36	S	
61.37	61.52(a)	D	[61.37 now deleted]
61.38	61.38	S	
61.39(a)	61.33(a)	D	
61.39(b)	61.38(a)	R	
61.39(c)	1.733(a)(1)(ii)	R	
61.39(d)	61.38(a)	C, R	

—RULES, TARIFFS AND SUPPLEMENTS—

61.51	61.1(b)	R, S	[61.51 now deleted]
61.52	61.52(a)	C	
61.53	61.53	C	
61.54(a)	61.54(b)(1)	C, S	
61.54(b)	61.54(b)(2)		
61.54(c)(1)	61.54(b)(3)		
61.54(c)(2)	Deleted	D	[archaic]
61.54(d)(1)	61.68(a)	C, S	
61.54(d)(2)	Deleted	D	[not necessary]
61.54(e)	61.54(b)(4)		
61.55	61.54	R	[61.55 now deleted]
61.55(a)	61.54(d)	C	
61.55(b)	61.54(f)	C	
61.55(c)	61.54(g)	C	
61.55(d)	61.54(h)	C	
61.55(e)	61.54(i)(1)	C	
61.55(f)	61.2	R	
61.55(g)	61.54(j)	C, R	
61.55(h)	61.54(j)	C, R	
61.56	61.56	C	
61.57(a)	61.57(a)	C	
61.57(b)	61.57(b)		
61.57(c)(1)	61.57(c)(1)		
61.57(c)(2)	61.57(c)(2)		
61.57(c)(3)	61.57(c)(3)		
61.57(d)	61.57(d)		

61.57(e)	Deleted	D	[archaic]
61.57(f)	61.57(e)	R	
61.57(g)	61.57(f)	R	
61.58	61.58(a), (a)(1), (a)(4)	C, S	
	61.58(b)(2)	N	
61.58(a)	61.58(c)(1)(iii)		
61.58(b)	61.58(c)(2)		
61.58(c)	61.58(c)(3)		
61.58(d)	61.58(a)(2)		
61.58(e)	Deleted		
61.58(f)	61.58(b)		
61.59(a)	61.59	C, S	
61.59(b)	Deleted	D	[archaic]
61.59(c)	Deleted	D	[archaic]
61.60	61.58(c)(1)(i)	C, R	[61.60 now deleted]
61.61	61.58(c)(1)(ii)	C, R	[61.61 now deleted]
61.62	61.58(c)(1)(ii)	C, R	[61.62 now deleted]
61.63	61.58(c)(1)(ii)	C, R	[61.63 now deleted]
61.64	61.64	No change	
61.66	61.66(a)	C, S	
61.66(b)	61.66(b)		
61.66(c)	Deleted	D	[(c) deleted because no longer a tariffed service]
61.66(d)	61.66(c)	R	
61.67	61.67	C, S	
61.68	61.68(a)	C	
61.69(a)	61.69(a)	C	
61.69(b)	Deleted	D	[not necessary]
61.69(c)	61.1(b)	C	
61.70	61.68(b)	C, R	[61.70 now deleted]
61.71	61.71	C	
61.72	61.72(a), (b)	C	
61.72(a)	61.72(a)(1)		
61.72(b)	61.72(a)(2)		
61.73	61.73	C	
61.74	61.74(a)	No change	
(b)	(b)		
(c)	(c)		

—NEW SECTIONS—

	61.54(a)	N	[new scope section]
	61.54(c)(5)	N	[cross reference]
	61.54(e)	N	[optional tariff user's guide]
	61.58(a)(3)	N	[new notice for corrections]

—SPECIAL RULES, BOOK AND PAMPHLET TARIFFS AND SUPPLEMENTS—

61.91	61.1(b)	S	[61.91 now deleted]
61.92	61.52(b)	S	[61.92 now deleted]
61.93	Deleted	D	[archaic, 61.93 now deleted]
61.94	61.54(i)(2)	S	[61.94 now deleted]
61.95	Deleted	D	[archaic, 61.95 now deleted]
61.96	Deleted	D	[archaic, 61.96 now deleted]

—SPECIAL RULES, LOOSE-LEAF TARIFFS—

61.111	61.1(b)	D	[redundant, 61.111 now deleted]
61.112	61.52(b)	R, S	[redundant, 61.112 now deleted]
61.113(a)	61.54(c)(1)	C, R	[61.113 now deleted]
	61.54(c)(3)	R	
61.113(b)	61.54(c)(3)	C, R	[61.113 now deleted]
61.114	61.54(c)(4)	C, R	[61.114 now deleted]
61.115	61.54(c)(1)	C, R	[61.115 now deleted]

	61.54(c)(2)		
61.116	61.56	D, R	[61.116 now deleted]
61.117	61.69(a)	R	[61.117 now deleted]
61.118(a)	61.54(i)(2)	R	[no change, 61.118 now deleted]
61.118(b)	61.54(i)(3)	R, S	[61.118 now deleted]
61.119	61.54(b)(5)	R	[61.119 now deleted]

—SPECIAL RULES APPLICABLE TO THROUGH SERVICE—

61.131	61.134	C	
61.132	61.134	C	
61.133	61.1(c), 61.132	S	
61.134	61.136	R, S	
61.135	61.132	C, R	
61.136	61.133	C, R	
61.137	61.132	R	
61.138	61.137	C, R	

—SPECIAL PERMISSIONS—

61.151	61.153	C	
61.152	61.152	C	
61.153	61.152, 61.153	S	

ADOPTION OF TARIFFS AND OTHER DOCUMENTS OF PREDECESSOR CARRIERS

61.171	61.171	S	
61.172	Deleted	D	[archaic]
61.173	Deleted	D	[archaic, 61.173 now deleted]
61.174	61.172	R, C	[61.174 now deleted]

—SUSPENSIONS—

61.191	61.191	C	
61.192	61.192	C	
61.193	61.193	C	

APPENDIX B

CROSS INDEX: PROPOSED SECTIONS

New §	*Old §*
	Part 1
1.773(a)(1)(i)	1.773(a)(1)
1.773(a)(1)(ii)	61.39(c)
1.773(b)(1)(iv)	N
	Part 61
	—CONTENTS—
61.1(a)	N
(b)	61.1, 61.31, 61.51, 61.69(c), 61.91, 61.111
(c)	61.133
61.2	61.55(f)
	—DEFINITIONS—
61.11	61.11
61.12(a)	61.14
(b)	61.15
(c)	61.16
(d)	61.15a(b)

(e)	N	
61.13	61.21(e)	
61.14	61.12	
61.15	N	
61.16	61.13	
61.17	61.21(b)	
61.18	61.21(f)	
61.19	N	
61.20	61.21(g)	
61.21	61.18	
61.22	N	
61.23	N	
61.24	61.20	
61.25	61.21(c)	
61.26	N	

—GENERAL RULES—

61.31 [Deleted]	61.31	[now in 61.1(b)]
61.32	61.32	
61.33(a)	61.33(a), 61.33(c), 61.39(a)	
(b)	N	
(c)	61.33(a)	
(d)	61.33(b)	
61.34 [Deleted]	61.34	[deleted in previous revisions]
61.35	61.35	
61.36	61.36	
61.37 [Deleted]	61.37	[now in 61.52(a)]
61.38	61.38, 61.39(b), 61.39(d)	
61.39 [Deleted]	61.39	[now in 61.33, 61.38, 1.773]

—SPECIFIC RULES FOR TARIFF PUBLICATIONS—

61.51 [Deleted]	61.51	[now in 61.1(b)]
61.52(a)	61.37, 61.52	
(b)	61.92, 61.112	
61.53	61.53	
61.54(a)	N	
(b)(1)	61.54(a)	
(2)	61.54(b)	
(3)	61.54 (c)(1)	
(4)	61.54 (e)	
(5)	61.119	
(c)(1)	61.113(a), 61.115	
(2)	61.115	
(3)	61.113(a), 61.113(b)	
(4)	61.114	
(5)	N	
(d)	61.55(a)	
(e)	N	
(f)	61.55(b)	
(g)	61.55(c)	
(h)	61.55(d)	
(i)(1)	61.55(e)	
(2)	61.94, 61.118(a)	[deleted part as archaic]
(3)	61.118(b)	
(j)	61.55(g), 61.55(h)	
61.55 [Deleted]	61.55	[now in 61.54]
61.56	61.56, 61.116	
61.57(a)	61.57(a)	
(b)	61.57(b)	
(c)(1)	61.57(c)(1)	
(2)	61.57(c)(2)	
(3)	61.57(c)(3)	
(d)	61.57(d)	
(e)	61.57(f)	
(f)	61.57(g)	

61.58(a)	61.58	
(a)(1)	61.58	
(2)	61.58(d)	
(3)	N	
(4)	61.58	
(b)	61.58(f)	[delete part of 61.3(d), 7 day reg]
(c)(1)(i)	61.60	
(ii)	61.61, 61.62, 61.63	
(iii)	61.58(a), 61.21(a), 61.21(d)	
(2)	61.58(b)	
(3)	61.58(c)	
61.59	61.59(a)	
61.60 [Deleted]	61.60	[now in 61.58]
61.61 " "	61.61	"
61.62 " "	61.62	"
61.63 " "	61.63	"
61.64 " "	61.64	
61.66(a)	61.66(a)	
(b)	61.66(b)	
	61.66(c)	[Deleted]
(c)	61.66(d)	
61.67	61.67	
61.68(a)	61.54(d), 61.68	
(b)	61.70	
61.69	61.69(a), 61.117	
61.70 [Deleted]	61.70	[now in 61.68(b)]
61.71	61.71	
61.72(a)	61.17, 61.72	[defn]
61.72(a)(1)	61.72(a)	
(2)	61.72(b)	
(b)	61.72	
61.73	61.73	
61.74(a)	61.74(a)	
(b)	61.74(b)	
(c)	61.74(c)	
61.91 [Deleted]	61.91	[now in 61.1(b)]
61.92 " "	61.92	[now in 61.52(b)]
61.93 " "	61.93	[archaic]
61.94 " "	61.94	[now in 61.54(i)(2)]
61.95 " "	61.95	[archaic]
61.96 " "	61.96	[archaic]
61.111 [Deleted]	61.111	[now in 61.1(b)]
61.112 " "	61.112	[now in 61.52(b)]
61.113(a) " "	61.113(a)	[now in 61.54(c)(1), 61.54(c)(3)]
61.113(b) " "	61.113(b)	[now in 61.54(c)(3)]
61.114 " "	61.114	[now in 61.54(c)(4)]
61.115 " "	61.115	[now in 61.54(c)(1), 61.54(c)(2)]
61.116 " "	61.116	[now in 61.56]
61.117 [Deleted]	61.117	[now in 61.69(a)]
61.118(a) [Deleted]	61.118(a)	[now in 61.54(i)(2)]
61.118(b) [Deleted]	61.118(b)	[now in 61.54(i)(3)]
61.119 [Deleted]	61.119	[now in 61.54(b)(5)]

—CONCURRENCES—

61.131	N	[new scope section]
61.132	61.133, 61.135, 61.137	
61.133	61.136	
61.134	61.131, 61.132	
61.135	N	[additional concurrences allowed]
61.136	61.134	
61.137	61.138	

—APPLICATIONS FOR SPECIAL PERMISSION—

61.151	N	[new scope section]
61.152	61.152, 61.153	

61.153	**61.151, 61.153**	
—ADOPTION OF TARIFFS AND OTHER DOCUMENTS OF PREDECESSOR CARRIERS—		
61.171	**61.171**	
	61.172, 61.173	**[Deleted]**
61.172	**61.174**	
—SUSPENSIONS—		
61.191	**61.191**	
61.192	**61.192**	
61.193	**61.193**	

APPENDIX C

PROPOSED PART 61 RULES

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61.1 **Purpose and Application.**
61.2 **Clear and Explicit Explanatory Statements.**

DEFINITIONS

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61.12 **Carriers.**
61.12(a) **Concurring carrier.**
61.12(b) **Connecting carrier.**
61.12(c) **Issuing carrier.**
61.12(d) **Non-Dominant carrier.**
61.12(e) **Other participating carrier.**
61.13 **Change in rate structure.**
61.14 **Charges.**
61.15 **Commercial Contractor.**
61.16 **Commission.**
61.17 **Corrections.**
61.18 **New service offering.**
61.19 **Rate.**
61.20 **Rate increase.**
61.21 **Regulations.**
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61.23 **Tariff.**
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61.25 **Text change.**
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GENERAL RULES

61.31 **Deleted.**
61.32 **Method of filing publications.**
61.33 **Letters of transmittal.**
61.34 **Deleted.**
61.35 **Delivered free of charges.**
61.36 **Tariff publications not returned.**
61.37 **Deleted.**
61.38 **Supporting information to be submitted with letters of transmittal.**
61.39 **Deleted.**

SPECIFIC RULES FOR TARIFF PUBLICATIONS

61.51	**Deleted.**
61.52	**Form, size, type, legibility, etc.**
61.53	**Consecutive numbering.**
61.54	**Composition of tariffs.**
61.55	**Deleted.**
61.56	**Supplements.**
61.57	**Cancellations.**
61.58	**Notice requirements.**
61.59	**Effective period required before changes.**
61.60	**Deleted.**
61.61	**Deleted.**
61.62	**Deleted.**
61.63	**Deleted.**
61.64	**Charges and regulations for ticker service.**
61.66	**Changes in message telegraph service point listings where basic schedules of rates and regulations are already effective.**
61.67	**New or discontinued telephone, telegraph, teletypewriter service points; mileages.**
61.68	**Special notations.**
61.69	**Rejection.**
61.70	**Deleted.**
61.71	**Reissued matter.**
61.72	**Posting.**
61.73	**Duplication of rates or regulations.**
61.74	**References to other instruments.**
61.91–61.96	**Deleted.**
61.111–61.119	**Deleted.**

CONCURRENCES

61.131	**Scope.**
61.132	**Method of filing concurrences.**
61.133	**Format of concurrences.**
61.134	**Concurrences for through services.**
61.135	**Concurrences for other purposes.**
61.136	**Revocation of concurrences.**
61.137	**Alaskan carriers and licensees of mobile radio stations.**

APPLICATIONS FOR SPECIAL PERMISSION

61.151	**Scope.**
61.152	**Terms of applications and grants.**
61.153	**Method of filing applications.**

ADOPTION OF TARIFFS AND OTHER DOCUMENTS OF PREDECESSOR CARRIERS

61.171	**Adoption notice.**
61.172	**Changes to be incorporated in tariffs of successor carrier.**
61.173	**Deleted.**
61.174	**Deleted.**

SUSPENSIONS

61.191	**Carrier to file supplement when notified of suspension.**

61.192 Contents of supplement announcing suspension.

61.193 Vacation of suspension order; supplements announcing same; etc.

AUTHORITY: §§61.1 to 61.193 issued under sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

§61.1 Purpose and Application.

(a) The purpose of this part is to prescribe the framework for the initial establishment of and subsequent revisions to tariff publications.

(b) Tariff publications filed with the Commission must conform to the rules in this part. Failure to comply with any provision of this part may be grounds for rejection of the non-complying publication.

(c) No carrier required to file tariffs may provide any interstate or foreign communication service until every tariff publication for such communication service is on file with the Commission and in effect.

§61.2 Clear and explicit explantory statements.

In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explantory statements regarding the rates and regulations.

DEFINITIONS

§61.11 Act.

The Communications Act of 1934 (48 Stat. 1004; 47 U.S.C. Chapter 5), as amended.

§61.12 Carriers.

(a) Concurring carrier.

A carrier (other than a connecting carrier) subject to the act which concurs in and assents to schedules of rates and regulations filed on its behalf by an issuing carrier or carriers.

(b) Connecting Carrier.

A carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier.

(c) Issuing Carrier.

A carrier subject to the Act which publishes and files a tariff or tariffs with the Commission.

(d) Non-Dominant Carrier.

A carrier found by the Commission not to have market power (i.e., power to control prices).

(e) Other Participating Carrier.

A carrier subject to the Act which publishes a tariff containing rates and regulations applicable to the portion of through service it furnishes in conjunction with another subject carrier.

§61.13 Change in Rate Structure.

A restructuring of the rate components for an existing service.

§61.14 Charges.

The price for service based on tariffed rates.

§61.15 Commercial Contractor.

The commercial firm to whom the Commission annually awards a contract to make copies of Commission records for sale to the public.

§61.16 Commission.

The Federal Communications Commission.

§61.17 Corrections.

The remedy of errors in typing, spelling, or punctuation.

§61.18 New Service Offering.

A tariff filing which provides for a class or sub-class of service not previously offered.

§61.19 Rate.

The tariffed price per unit of service.

§61.20 Rate Increase.

Any change in a tariff which results in an increased rate or charge to any of the filing carrier's customers.

§61.21 Regulations.

The body of carrier prescribed rules in a tariff governing the offering of service in that tariff including rules, practices, classifications and definitions.

§61.22 Supplement.

A publication filed as part of a tariff for the purpose of revising any schedule of rates or regulations in that tariff, and numbered independently from the tariff page series.

§61.23 Tariff.

Schedules of rates and regulations filed by common carriers.

§61.24 Tariff Publication, or Publication.

A tariff, supplement, revised page, additional page, concurrence, notice of revocation, adoption notice, or any other schedule of rates or regulations.

§61.25 Text Change.

A change in the text of a tariff which does not result in a change in any rate or regulation.

§61.26 United States.

The several States and Territories, the District of Columbia, and the possessions of the United States.

GENERAL RULES

§61.31 Deleted.

§61.32 Method of filing publications.

Publications sent for filing must be addressed to "Secretary, Federal Communications Commission, Washington, D.C. 20554." Two copies of tariff publications must be filed under a letter of transmittal. The date on which the publication is received by the Secretary of the Commission, or by the Mail Room where submitted by mail, is considered the official filing date. Simultaneously with the filing of the publication, and by the same means, the issuing carrier must send a copy of the publication, supporting information specified in Section 61.38, and transmittal letter to (1) the commercial contractor (at its office on Commission premises) and (2) the Chief, Tariff Review Branch. The latter should be clearly labelled as the "Public Reference Copy." The copies of supporting information required here are in addition to those required by Section 61.38(c).

§61.33 Letters of Transmittal.

(a) All publications filed with the Commission must be accompanied by a letter of transmittal, 81/2 by 11 inches in size. All letters of transmittal must (1) concisely explain the nature and purpose of the filing; (2) specify whether supporting information under Section 61.38 is required; (3) state whether copies have been delivered to the Commercial Contractor and Chief, Tariff Review Branch as required by Section 61.32.

(b) In addition to the requirements set forth in (a), the letter of transmittal must specifically reference by number any facility authorization or special permission necessary to implement the tariff publication. Special permission must be granted prior to the filing of the tariff publication, and may not be requested in the transmittal letters.

(c) The letter of transmittal must be substantially in the following format.

____
(Exact name of carrier in full)

____
(Post Office Address)

__________________________, 19
(Date)

Transmittal No. ________________
Secretary,
Federal Communications Commission
Washington, D.C. 20554

ATTENTION: Common Carrier Bureau

The accompanying tariff (or other publication) issued by ____, and bearing FCC No. __, effective ____, 19__, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. (Here give the additional information required).

____
(Name of issuing officer or agent)

____
(Title)

(d) A separate letter of transmittal may accompany each publication, or the above format may be modified to provide for filing as many publications as desired with one transmittal letter.

Note: If a receipt for the accompanying publication is desired, the letter of

transmittal must be sent in duplicate. One copy showing the date of receipt by the Commission will then be returned to the sender.

§61.34 Deleted.

§61.35 Delivered free of charges.

Tariff publications must be delivered to the Commission free from all charges, including claims for postage.

§61.36 Tariff publications not returned.

Tariff publications will not be returned.

§61.38 Supporting information to be submitted with letters of transmittal.

(a) *Scope.*This section applies to dominant carriers whose annual gross revenues exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. However, the Commission may require any carrier to submit such information as may be necessary for review of a tariff filing.

(b) *Explanation and data supporting either changes or new tariff offerings.*The material to be submitted for a tariff change which affects rates or charges or for a tariff offering a new service, must include an explanation of the changed or new matter, the reasons for the filing, the basis of ratemaking employed, and economic information to support the changed or new matter.

(1) For a tariff change the carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A cost of service study for all elements for the most recent 12 month period;

(ii) A study containing a projection of costs for a representative 12 month period; and

(iii) Estimates of the effect of the changed matter on the traffic and revenues from the service to which the changed matter applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (ii) above.

(2) For a tariff filing offering a new service, the carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A study containing a projection of costs for a representative 12 month period; and

(ii) Estimates of the effect of the new matter on the traffic and revenues from the service to which the new matter applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (i) above.

(c) *Working papers and statistical data.*(1) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the Chief, Tariff Review Branch must be provided two sets of working papers containing the information underlying the data supplied in response to paragraph (b) of this section, and a clear explanation of how the working papers relate to that information.

(2) All statistical studies must be submitted and supported in the form prescribed in Section 1.363 of the Commission's Rules.

(d) *Form and content of additional material to be submitted with certain rate increases.*In the circumstances set out in (1) and (2) below, the filing carrier must submit all additional cost, marketing and other data underlying the working papers to justify a proposed rate increase. The carrier must submit this information in suitable form to serve as the carrier's direct case in the event the rate increase is set by the Commission for investigation.

(1) Rate increases affecting single services or tariffed items.

(i) A rate increase in any service or tariffed item which results in more than $1 million in additional annual revenues, calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A single rate increase in any service or tariffed item, or successive rate increases in the same service or tariffed item within a 12 month period, either of which results in:

(a) at least a 10 per cent increase in annual revenues from that service or tariffed item, and

(b) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(2) Rate increases affecting more than one service or tariffed item.

(i) A general rate increase in more than one service or tariffed item occurring at one time, which results in more than $1 million in additional revenues calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A general rate increase in more than one service or tariffed item occurring at one time, or successive general rate increases in the same services or tariffed items occurring within a 12 month period, either of which results in:

(a) at least a 10 per cent increase in annual revenues from those services or tariffed items, and

(b) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(e) *Submission of explanation and data by connecting carriers.*If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, the connecting carrier must provide the data required by paragraphs (b) and (c) of this section on the date the issuing carrier files the tariff matter with the Commission.

(f) *Copies of explanation and data to customers.*Concurrently with the filing of any rate for special construction (or special assembly equipment and arrangements) developed on the basis of estimated costs, the offering carrier must transmit to the customer a copy of the explanation and data required by paragraphs (b) and (c) of this section.

§61.39 Deleted.

SPECIFIC RULES FOR TARIFF PUBLICATIONS

§61.51 Deleted.

§61.52 Form, size, type, legibility, etc.

(a) All tariff publications must be in loose-leaf form of size 81/2 by 11 inches, and must be plainly printed in black print on white paper of durable quality. Less than 6-point type may not be used. Erasures or alterations in writing must not be made in any tariff publication filed with the Commission or in those copies posted for public convenience. A margin of no less than one inch in width must be allowed at the left edge of every tariff publication.

(b) Pages of tariffs must be printed on one side only, and must be numbered consecutively and designated as "Original title page," "Original page 1," "Original page 2," etc.

(1) All such pages must show, in the upper left-hand corner the name of the issuing carrier; in the upper right-hand corner the FCC number of the tariff, with the page designation directly below; in the lower left-hand corner the issued date; in the lower right-hand corner the effective date; and at the bottom, center, the street address of the issuing officer. The carrier must also specify the issuing officer's name and title either at the bottom center of all tariff pages, or on the title page and check sheet only.

(2) As an alternative, the issuing carrier may show in the upper left-hand corner the name of the issuing carrier, the name, title, and street address of the issuing officer, and the issued date; and in the upper right hand corner the FCC number of the tariff, with the page designation directly below, and the effective date. The carrier must specify the issuing officer's name and title in the upper left-hand corner of either all tariff pages, or on the title page and check sheet only. A carrier electing to place the information at the top of the page should annotate the bottom of each page to indicate the end of the material, e.g., a line, or the term "Printed in USA," or "End".

(3) Only one format may be employed in a tariff publication.

§61.53 Consecutive numbering.

Carriers should file tariff publications under consecutive FCC numbers. If this cannot be done, a memorandum containing an explanation of the missing number or numbers must be submitted. Supplements to a tariff must be numbered consecutively in a separate series.

§61.54 Composition of tariffs.

(a) Tariffs must contain in consecutive order: a title page; check sheet; table of contents; list of concurring, connecting, and other participating carriers; explanation of symbols and abbreviations; application of tariff; general rules (including definitions), regulations, exceptions and conditions; and rates. If the issuing carrier elects to add a section assisting in the use of the tariff, it should be placed immediately after the table of contents.

(b) The title page of every tariff and supplement must show:

(1) *FCC number, indication of cancellations.*In the upper right-hand corner, the designation of the tariff or supplement as "FCC No. __," or "Supplement No. __to FCC No. __," and immediately below, the FCC number or numbers of tariffs or supplements canceled thereby.

(2) *Name of carrier, class of service, geographical application, means of transmission.*The exact name of the carrier, and such other information as may be necessary to identify the carrier issuing the tariff publication; a brief statement showing each class of service provided; the geographical application; and the type of facilities used to provide service.

(3) *Expiration Date.* When the entire tariff or supplement is to expire with a fixed date, the expiration date must be shown in connection with the effective date in the following manner: Expires at the end of _____ (date) unless sooner canceled, changed or extended.

(4) *Name, title and address of issuing officer.* The name, title and street address of the officer issuing the tariff or supplement in the format specified in Section 61.52.

(5) *Revised title page.* When a revised title page is issued, the following notation must be shown in connection with its effective date: Original tariff effective _____ (here show the effective date of the original tariff).

(c) (1) The page immediately following the title page must be designated as "Original page 1" and captioned "Check Sheet." When the original tariff is filed, the check sheet must show the number of pages contained in the tariff. For example, "Page 1 to 150, inclusive, of this tariff are effective as of the date shown." When new pages are added, they must be numbered in continuing sequence, and designated as "Original page ____." For example, when the original tariff filed has 150 pages, the first page added after page 150 is to be designated as "Original page 151," and the foregoing notation must be revised to include the added pages.

(2) If pages are to be inserted between numbered pages, each such page must be designated as an original page and must bear the number of the immediately preceding page followed by an alpha or numeric suffix. For example, when two new pages are to be inserted between pages 44 and 45 of the tariff, the first inserted page must be designated as Original page 44A or 44.1 and the second inserted page as Original page 44B or 44.2. Issuing carriers may not utilize both the alpha and numeric systems in the same publication.

(3) When pages are revised, when new pages (including pages with letter or numeric suffix as set forth above) are added to the tariff, or when supplements are issued, the check sheet must be revised accordingly. Revised check sheets must indicate with an asterisk the specific pages added or revised. In addition to the notation in (1), the check sheet must list, under the heading "The original and revised pages named below (and Supplement No. __) contain all changes from the original tariff that are in effect on the date shown," all original pages in numerical order that have been added to the tariff and the pages which have been revised, including the revision number. For example:

Page	**Number of revision except as indicated**
Title	**1st**
1	**8th***
3	**5th**
5A	**Orig.***
10	**8th***
151	**Orig.**

*** Page Issued _____ (date).**

(4) Changes in, and additions to tariffs must be made by reprinting the page upon which a change or addition is made. Such changed page is to be designated as a revised page, cancelling the page which it amends. For example, "First revised page 1 cancels original page 1," or "Second revised page 2 cancels first revised page 2," etc. When a revised page omits rates or regulations previously published on the page which it cancels, but such rates or regulations are published on another page, the revised page must make specific reference to the page on which the rates or regulations will be found. This reference must be accomplished by inserting a sentence at the bottom of the revised page that states "Certain rates (or regulations) previously found on this page can now be found on page ___ ." In addition, the page on which the omitted material now appears must bear the appropriate symbol opposite

such material, and make specific reference to the page from which the rates or regulations were transferred. This reference must be accomplished by inserting a sentence at the bottom of the other page that states "Certain rates (or regulations) on this page formerly appeared on page ___."

(5) Rejected pages must be treated as indicated in Section 61.69.

(d) *Table of contents.* The table of contents must contain a full and complete statement showing the exact location and specifying the page or section and page numbers, where information by subjects under general headings will be found. If a tariff contains so small a volume of matter that its title page or its interior arrangement plainly discloses its contents, the table of contents may be omitted.

(e) *Tariff User's guide.* At its option, a carrier may include a section explaining how to use the tariff.

(f) *List of concurring carriers.* This list must contain the exact name or names of carriers concurring in the tariff, alphabetically arranged, and the name of the city or town in which the principal office of every such carrier is located. If there are no concurring carriers, then the statement "no concurring carriers" must be made at the place where the names of the concurring carriers would otherwise appear. If the concurring carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference to such separate tariff by FCC number must be made in the tariff at the place where such names would otherwise appear.

(g) *List of connecting carriers.* This list must contain the exact name or names of connecting carriers, alphabetically arranged, for which rates or regulations are published in the tariff, and the name of the city or town in which the principal office of every such carrier is located. If there are no connecting carriers, then the statement "no connecting carriers" must be made at the place where their names would otherwise appear. If connecting carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference to such separate tariff by FCC number must be made in the tariff at the place where such names would otherwise appear.

(h) *List of other participating carriers.* This list must contain the exact name of every other carrier subject to the Act engaging or participating in the communication service to which the tariff or supplement applies, together with the name of the city or town in which the principal office of such carrier is located. If there is no such other carrier, then the statement "no participating carriers" must be made at the place where the names of such other carriers would otherwise appear. If such other carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference must be made in the tariff at the place where such names would otherwise appear. The names of concurring and connecting carriers properly listed in a tariff published by any other participating carrier need not be repeated in this list.

(i) (1) *Symbols, reference marks, abbreviations.* The tariff must contain an explanation of symbols, reference marks, and abbreviations of technical terms used. The following symbols used in tariffs are reserved for the purposes indicated below:

R to signify reduction.
I to signify increase.
C to signify changed regulation.
T to signify a change in text but no change in rate or regulation.

S to signify reissued matter.
M to signify matter relocated without change.
N to signify new rate or regulation.
D to signify discontinued rate or regulation.
Z to signify a correction.

(2) The uniform symbols must be used as follows.

(i) When a change of the same character is made in all or in substantially all matter in a tariff, it may be indicated at the top of the title page of the tariff or at the top of each affected page, in the following manner: "All rates in this tariff are increases," or, "All rates on this page are reductions, except as otherwise indicated."

(ii) When a change of the same character is made in all or substantially all matters on a page or supplement, it may be indicated at the top of the page or supplement in the following manner: "All rates on this page (or supplement) are increases," or "All rates on this page (or supplement) are reductions except as otherwise indicated."

(3) Items which have not been in effect 30 days when brought forward on revised pages must be shown as reissued, in the manner prescribed in Section 61.54(i)(1). Items which have been in effect 30 days or more and are brought forward without change on revised pages must not be shown as reissued items.

(j) *Rates and general rules, regulations, exceptions and conditions.* The general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate. Rates must be expressed in United States currency, per chargeable unit of service for all communication services, together with a list of all points of service to and from which the rates apply. They must be arranged in a simple and systematic manner. Complicated or ambiguous terminology may not be used, and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition named in any other tariff.

§ 61.55 Deleted.

§ 61.56 Supplements.

A carrier may not file a supplement except to suspend or cancel a tariff.

§ 61.57 Cancellations.

The following paragraphs govern the cancellation of tariffs and supplements.

(a) *By tariff or supplement.* A carrier may cancel any tariff or supplement in whole or in part by another tariff or supplement. Cancellation of a tariff automatically cancels every supplement to that tariff, except a cancelling supplement.

(b) *By expiration.* Subject to Section 61.59, a carrier may cancel a tariff or supplement in whole or in part by fixing a date on which the rates or regulations will expire.

(c) *Indication of.* (1) A carrier which cancels a tariff or supplement in whole by another tariff or supplement must comply with Section 61.54(b)(1). Cancellation of tariffs or supplements in whole by expiration must be indicated as provided in Section 61.54(b)(3).

(2) Where a carrier issues a tariff, supplement, or revised page partially cancelling another tariff, supplement, or revised page, it must specifically state what portion of the other tariff publication is cancelled. Such other tariff or supplement must at the same time be correspondingly amended, effective on the same date.

(3) When only a part of a tariff or supplement is to expire, a carrier must show the expiration date on the same page, and associate it with the matter which is to expire. Changes in expiration date must be made pursuant to the notice requirements of Section 61.58, unless otherwise authorized by the Commission. Expirations must be indicated as follows:

Expires at the end of ______ (date) unless sooner cancelled, changed or extended.

(d) *Rates and regulations to apply.* When a carrier cancels a tariff or supplement in whole or in part by another tariff or supplement, the cancelling publication must show where all rates and regulations will be found, or what rates and regulations will apply.

(e) *Omissions.* When a tariff or supplement cancelling a previous tariff or supplement omits points of origin or destination, rates or regulations, or routes, which were contained in such tariff or supplement, the new tariff or supplement must indicate the omission in the manner prescribed in paragraph (c) of this section. If such omissions effect changes in rates or regulations, that fact must be indicated by the use of the uniform symbols prescribed in Section 61.54(i)(1).

(f) *Carriers ceasing operations.* Where a carrier ceases operations without a successor, it must cancel its tariffs pursuant to the notice requirements of Section 61.58, unless otherwise authorized by the Commission.

§ 61.58 Notice requirements.

(a) Every proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section.

(1) Notice is accomplished by filing the proposed tariff changes with the Commission. Any period of notice specified in this section begins on and includes the date the tariff is received by the Commission, but does not include the effective date. If a tariff filing proposes changes governed by more than one of the notice periods listed below, the longest notice period will apply. In computing the notice period required, all days including Sundays and holidays must be counted.

(2) The Chief, Common Carrier Bureau may require the deferral of the effective date of any tariff filing made on less than 90 days' notice, so as to provide for a maximum total of 90 days' notice, regardless of whether petitions under Section 1.773 of the Commission's rules have been filed.

(3) Tariff filings proposing corrections must be made on at least 3 days' notice, and may be filed notwithstanding the provisions of Section 61.59. Corrections to tariff materials not yet effective cannot take effect before the effective date of the original material.

(4) If the tariff publication would increase any rate or charge, or would effectuate an authorized discontinuance, reduction or other impairment of service to any customer, the offering carrier must inform the affected customers of the content of the tariff publication. Such notification should be made in a form appropriate to the circumstance, and may include written notification, personal contact, or advertising in newspapers of general circulation.

(b) *Non-Dominant Carriers.* Tariff filings of non-dominant carriers must be made on at least 14 days' notice.

(c) *Other Carriers.*

(1) Tariff filings in the instances specified in (i), (ii) and (iii) below must be made on at least 15 days' notice.

(i) Tariffs filed in the first instance by new carriers.

(ii) Tariff filings involving new rates and regulations not previously filed at, from, to or via points on new lines; at, from, to or via new radio facilities; or for new points of radio communication.

(iii) Tariff filings involving a change in the name of a carrier, a change in Vertical and Horizontal coordinates (or other means used to determine airline mileages), a change in the lists of mileages, a change in the lists of connecting, concurring or other participating carriers, text changes, or the imposition of termination charges calculated from effective tariff provisions. The imposition of termination charges does not include the initial filing of termination liability provisions.

(2) Tariff filings involving a change in rate structure, a new service offering, or a rate increase must be made on at least 45 days' notice.

(3) All tariff filings not specifically assigned a different period of public notice in this part must be made on at least 35 days' notice.

§ 61.59 Effective period required before changes.

Except as provided in Section 61.58(a)(3) or except as otherwise authorized by the Commission, new rates or regulations must be effective for at least 30 days before any change may be made.

§ 61.60 Deleted.

§ 61.61 Deleted.

§ 61.62 Deleted.

§ 61.63 Deleted.

§ 61.64 Rates and regulations for ticker service.

Rates and regulations for individual installations of market and stock quotation and baseball ticker service may be established on not less than 15 days' notice to the public and to the Commission, when there are no rates and regulations in effect for such service at the points where installations are to be made.

§ 61.66 Changes in message telegraph service point listings where basic schedules of rates and regulations are already effective.

(a) When an effective message telegraph service point listing specifies by dates (1) that communication service is available to or from a service point during sporting events, military maneuvers, shipping or resort seasons, or (2) that an office or agent of a carrier is located at such service point for the receipt or delivery of communications during those specified periods, changes in the dates may be filed on not less than 15 days' notice.

(b) An effective message telegraph service point listing may be changed on not less than 15 days' notice to show (1) that a point at which there is neither an office nor an agent of a telegraph company for the receipt or delivery of telegrams has been changed to a point at which there is such an office or agent, or (2) that a point at which there is an agent of a telegraph company to receive or deliver messages has been changed to a point at which there is a telegraph company office.

(c) A message telegraph service point listing may be changed on not less than 15 days' notice to reflect a discontinuance, reduction or impairment of service in accordance with a certificate or authorization granted by the Commission, if the total charges to the customer for service are not increased. Every schedule containing such changes must bear a notation showing the date and number of the certificate or authorization.

§ 61.67 New or discontinued telephone, telegraph, teletypewriter service points; mileages.

Message toll telephone service points and teletypewriter exchange service points added or discontinued during a calendar month, and message telegraph service points added during a calendar month, may be filed not later than 20 days after the end of such month where the basic schedules of rates and regulations applicable to such message toll telephone, teletypewriter exchange, and message telegraph service points are effective and the effective date of each addition or discontinuance is shown.

§ 61.68 Special Notation.

(a) A tariff filing must contain a statement of the authority for any matter to be filed on less than the notice required in Section 61.58. The following format must be used: "Issued on not less than __ days' notice under authority of ____ (specific reference to the special permission, decision, order or section of these rules)." If all the matter in a tariff publication is to become effective on less than the notice required in Section 61.58, specific reference to the Commission authority must be shown on the title page. If only a part of the tariff publication is to become effective on less than the notice required in Section 61.58, reference to the Commission authority must appear on the same page(s), and be associated with the pertinent matter.

(b) When a portion of any tariff publication is issued in order to comply with a Commission order, the following notation must be associated with that portion of the tariff publication: "In compliance with the order of the Federal Communications Commission in __ (a specific citation to the applicable order should be made)."

§ 61.69 Rejection.

When a tariff publication is rejected by the Commission, its number may not be used again. The rejected tariff publication may not be referred to as cancelled or revised. The publication that is subsequently issued in lieu of the rejected tariff publication must bear the notation "In lieu of __ , rejected by the Federal Communications Commission."

§ 61.70 Deleted.

§ 61.71 Reissued matter.

Matter in effect for less than 30 days and brought forward without change from another tariff publication must bear the appropriate symbol provided in Section 61.54(i)(1) for reissued matter. The number and original effective date of the tariff publication in which the matter was originally published must be associated with the reissued matter.

§ 61.72 Posting.

(a) Offering carriers must post (i.e., keep accessible to the public) during the carrier's regular business hours, a schedule of rates and regulations. This schedule must include all effective and proposed rates and regulations pertaining to the services offered to and from the community or communities served, and must be the same as that on file with the Commission. This posting requirement may be satisfied by either of the following methods:

(1) First Method. Where the filing carrier has an office or offices open to the public in communities or territories of the United States, the carrier must post the schedule of rates and regulations in the main office.

(2) Second Method. The schedule of rates and regulations must be posted in each state or territory of the United States in which the carrier operates, as follows:

(i) in the main office of the filing carrier open to the public in every city with a population of 100,000 or more in that state or territory (or in the largest community served if none has a population of 100,000); and

(ii) in the main office of the carrier in the state or territorial capital.

If a carrier chooses this method, it must post a notice in each business office of the carrier open to the public in that state or territory, stating the street address of the nearest location in which the schedule of rates and regulations can be found.

(b) The posting of rates and regulations shall be considered timely if they are available for public inspection at the posting locations within 15 days of their filing with the Commission.

§ 61.73 Duplication of rates or regulations.

A carrier concurring in schedules of another carrier must not publish conflicting or duplicative rates or regulations.

§ 61.74 References to other instruments.

(a) Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument.

(b) Tariffs for end-on-end through services may reference the tariffs of other carriers participating in the offering.

(c) Tariffs may reference concurrences for the purpose of stating where rates or regulations applicable to a service not governed by the tariff may be found.

§ 61.91 Deleted.

§ 61.92 Deleted.

§ 61.93 Deleted.

§ 61.94 Deleted.

§ 61.95 Deleted.

§ 61.96 Deleted.

§ 61.111 Deleted.

§ 61.112 Deleted.

§ 61.113 Deleted.

§ 61.114 Deleted.

§ 61.115 Deleted.

§ 61.116 Deleted.

§ 61.117 Deleted.

§ 61.118 Deleted.

§ 61.119 Deleted.

CONCURRENCES

§ 61.131 Scope.

Sections 61.132 through 61.137 apply to a carrier which must file concurrences reflecting rates and regulations for through service provided in conjunction with other carriers and to a carrier which has chosen, as an alternative to publishing its own tariff, to arrange concurrence in an effective tariff of another carrier. Limited or partial concurrences will not be permitted.

§ 61.132 Method of filing concurrences.

A carrier proposing to concur in another carrier's effective tariff must deliver two copies of the concurrence to the issuing carrier in whose favor the concurrence is issued. The concurrence must be signed by an officer or agent of the carrier executing the concurrence, and must be numbered consecutively in a separate series from its FCC tariff numbers. At the same time the issuing carrier revises its tariff to reflect such a concurrence, it must submit both copies of the concurrence to the Commission. The concurrence must bear the same effective date as the date of the tariff filing reflecting the concurrence.

§ 61.133 Format of concurrence.

(a) Concurrences must be issued in the following format:

CONCURRENCE
F.C.C. Concurrence No.
(Cancels F.C.C. Concurrence No. ______)
(Name of Carrier ______)
(Post Office Address ______)
__________, 19 __
(Date)

Secretary,
Federal Communications Commission
Washington D.C. 20554

This is to report that ________________ assents to and concurs in the
(name of concurring carrier)
tariff described below.

________________ thus makes itself a party to these tariffs and
(name of concurring carrier)
obligates itself (and its connecting carriers) to observe every provision in them, until a notice of revocation is filed with the Commission and delivered to the issuing carrier.

This concurrence applies to interstate (and foreign) communication:

1. Between the different points on the concurring carrier's own system;
2. Between all points on the concurring carrier's system and the systems of its connecting carriers; and

3. Between all points on the system of the concurring carrier and the systems of its connecting carriers on the one hand, and, on the other hand, all points on the system of the carrier issuing the tariff or tariffs listed below and the systems of its connecting carriers and other carriers with which through routes have been established.

(NOTE: Any of the above numbered paragraphs may be omitted or the wording modified to state the points to which the concurrence applies.)

TARIFF

(Here describe the tariff or tariffs concurred in by the carrier, specifiying FCC number, title, date of issuance, and date effective. Example: A.B.C. Communications Company, Tariff FCC No. 1, Interstate Telegraph Message Service, Issued January 1, 1983, Effective April 1, 1983).

Cancels FCC Concurrence No. ____ , effective ______ , 19__ .

____
(Name of concurring carrier)
By _____________________________
(Title)

(b) No material is to be included in a concurrence other than that indicated in the above-prescribed form, unless specially authorized by the Commission. A concurrence in any tariff so described will be deemed to include all amendments and successive issues which the issuing carrier may make and file. All such amendments and successive issues will be binding between customers and carriers. Between carriers themselves, however, the filing by the issuing carrier of an amendment or successive issue with the Commission must not imply or be construed to imply an agreement to the filing by concurring carriers. Such filings do not affect the contractual rights or remedies of any concurring carrier(s) which have not, by contract or otherwise, specifically consented in advance to such amendment or successive issue.

§ 61.134 Concurrences for through services.

A carrier filing rates or regulations for through services between points on its own system and points on another carrier's system (or systems), or between points on another carrier's system (or systems), must list all concurring, connecting or other participating carriers as provided in Sections 61.54(f), (g) and (h). Except as provided in Section 61.137, a concurring carrier must tender a properly executed instrument of concurrence to the issuing carrier. If rates and regulations of the other carriers engaging in the through service(s) are not specified in the issuing carrier's tariff, that tariff must state where the other carrier's rates and regulations can be found. Such reference(s) must contain the FCC number(s) of the referenced tariff publication(s), the exact name(s) of the carrier(s) issuing such tariff publication(s), and must clearly state how the rates and regulations in the separate publications apply.

§ 61.135 Concurrences for other purposes.

When an issuing carrier permits another carrier to concur in its tariff, the issuing carrier's tariff must state the concurring carrier's rates and points of service.

§ 61.136 Revocation of concurrences.

A concurrence may be revoked by a revocation notice or cancelled by a new concurrence. A revocation notice or a new concurrence, if less broad in scope than the concurrence it cancels, must bear an effective date not less than 90 days

after its receipt by the Commission. A revocation notice is not given a serial number, but must specify the number of the concurrence to be revoked and the name of the carrier in whose favor the concurrence was issued. It must be in the following format:

REVOCATION NOTICE

____
(Name of carrier)

____
(Post office address)

________________________, 19
(Date)

Secretary,
Federal Communications Commission
Washington, D.C. 20554

Effective ____________, 19 ______ FCC Concurrence No. ____________
issued by ________________________________
(Name of concurring carrier)
in favor of ________________________________
(Name of issuing carrier)
is hereby cancelled and revoked. Rates and regulations of ________________
(name of concurring carrier)
and its connecting carriers will thereafter be found in Tariff FCC No. ________
issued by ________ (If the concurring carrier has ceased operations, the revocation notice must so indicate.)

____
(Name of carrier)
By ________________________
(Title)

§ 61.137 Alaskan carriers and licensees of mobile radio stations.

Any carrier operating by wire or radio in Alaska, and any Commission licensee of a mobile radio station operating as a common carrier which participates in service with a carrier that has on file with the Commission a tariff containing the rates and regulations of the Alaskan carrier, or of the mobile radio licensee, need not file a written concurrence. However, any such Alaskan wire or radio carrier, or mobile radio station licensee, which has not filed either a written concurrence or an effective tariff in its own name, will be considered to have assented to, adopted and concurred in the tariff applicable to the service on file with the Commission.

APPLICATIONS FOR SPECIAL PERMISSION

§ 61.151 Scope.

Sections 61.152 and 61.153 set forth the procedures to be followed by a carrier applying for a waiver of any of the rules in this part.

§ 61.152 Terms of applications and grants.

Applications for special permission must contain (1) a detailed description of the tariff publication proposed to be put into effect; (2) a statement citing the specific rules and the grounds on which waiver is sought; and (3) a showing of good cause. If approved, the carrier must comply with all terms and use all authority specified in the grant. If a carrier elects not to use or use less than the authority granted, it must apply to the Commission for cancellation or modification of the original grant.

§ 61.153 Method of filing applications.

A carrier applying for special permission must submit two copies of the application (including illustrative tariff pages, associated amendments and exhibits) to the Secretary, Federal Communications Commission, Washington, D.C. 20554. Simultaneously, and by the same means, a carrier must furnish a separate copy with all attachments to the Chief, Tariff Review Branch. If a carrier applies for special permission to revise joint tariffs, the application must state that it is filed on behalf of all carriers participating in the affected service. Applications must be numbered consecutively in a series separate from the FCC tariff numbers, bear the signature of the officer or agent of the carrier, and be in the following format:

Application No.________
____
(Date)

Secretary,
Federal Communications Commission
Washington, D.C. 20554

Attention: Common Carrier Bureau

(here provide the statements required by Section 61.152).

____
(Exact name of carrier)
____
(Name of officer or agent)
____
(Title of officer or agent)

ADOPTION OF TARIFFS AND OTHER DOCUMENTS OF PREDECESSOR CARRIERS

§ 61.171 Adoption notice.

When a carrier's name is changed, or its operating control transferred from one carrier to another in whole or in part, the successor carrier must file tariff revisions to reflect the name change. The successor carrier may either immediately reissue the entire tariff in its own name, or immediately file an adoption notice. Within 15 days of filing an adoption notice, the successor must reissue the entire tariff in its own name. The reissued tariff must be numbered in the series of the successor carrier, and must contain all original pages without changes in regulations or rates. The transmittal letter must state the tariff is being filed to show a change in the carrier's name pursuant to Section 61.171 of the Commission's Rules. The adoption notice, if used, must read as follows:

The ____________________ here adopts, ratifies and makes
(Exact name of successor carrier or receiver)
its own in every respect, all applicable tariffs and amendments filed with the Federal Communications Commission ________ prior to _____.
(predecessor) (date)

§ 61.172 Changes to be incorporated in tariffs of successor carrier.

When only a portion of properties is transferred to a successor carrier, that

carrier must incorporate in its tariff the rates applying locally between points on the transferred portion. Moreover, the predecessor carrier must simultaneously cancel the corresponding rates from its tariffs, and reference the FCC number of the successor carrier's tariff containing the rates that will thereafter apply.

§ 61.173 Deleted.

§ 61.174 Deleted.

SUSPENSIONS

§ 61.191 Carrier to file supplement when notified of suspension.

If a carrier is notified by the Commission that its tariff filing has been suspended, the carrier must file immediately a consecutively numbered supplement without an effective date, which specifies the schedules which have been suspended.

§ 61.192 Contents of supplement announcing suspension.

(a) A supplement announcing a suspension by the Commission must specify the term of suspension imposed by the Commission.

(b) A supplement announcing a suspension of either an entire tariff or a part of a tariff publication, must specify the applicable tariff publication effective during the period of suspension.

§ 61.193 Vacation of suspension order; supplements announcing same; etc.

If the Commission vacates a suspension order, the affected carrier must issue a supplement or revised page stating the Commission's action as well as the lawful schedules.

APPENDIX D

SECTION-BY-SECTION ANALYSIS

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61.2 Clear and Explicit Explanatory Statements.

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61.35	Delivered free of charges.
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61.37	Deleted.
61.38	Supporting information to be submitted with letters of transmittal.
61.39	Deleted.

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61.64	Charges and regulations for ticker service.
61.66	Changes in message telegraph service point listings where basic schedules of rates and regulations are already effective.
61.67	New or discontinued telephone, telegraph, and teletypewriter service points; mileages.
61.68	Special notations.
61.69	Rejection.
61.70	Deleted.
61.71	Reissued matter.
61.72	Posting.
61.73	Duplication of rates or regulations.
61.74	References to other instruments.
61.91-61.96	Deleted.
61.111-61.119	Deleted.

CONCURRENCES

61.131	Scope.
61.132	Method of filing concurrences.
61.133	Format of concurrences.
61.134	Concurrences for through services.
61.135	Concurrences for other purposes.
61.136	Revocation of concurrences.
61.137	Alaskan carriers and licensees of mobile radio stations.

APPLICATIONS FOR SPECIAL PERMISSION

61.151	Scope.
61.152	Terms of application and grants.
61.153	Method of filing application.

ADOPTION OF TARIFFS AND OTHER DOCUMENTS OF PREDECESSOR CARRIERS

61.171	Adoption notice.
61.172	Changes to be incorporated in tariffs of successor carrier.
61.173	Deleted.
61.174	Deleted.

SUSPENSIONS

61.191	Carrier to file supplement when notified of suspension.
61.192	Contents of supplement announcing suspension.
61.193	Vacation of suspension order; supplements announcing same; etc.

AUTHORITY: §§ 61.1 to 61.193 issued under sec. 4, 48 Stat. 1066, as amended; 47 U.S.C.154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

§ 61.1 Purpose and Application.

EXPLANATION

New § 61.1(a) states the purpose of Part 61.

§ 61.1(b) consolidates old § 61.1 with repetitious restatements of that rule formerly found at 61.31, 61.51, 61.91, and 61.111. § 61.1(b) also clarifies and restates former § 61.69(c), relocated here because of general applicability.

§ 61.1(c) clarifies and restates former § 61.133, and is relocated here because of general applicability.

PROPOSED RULE

§ 61.1 Purpose and Application.

(a) The purpose of this part is to prescribe the framework for the initial establishment of and subsequent revisions to tariff publications.

(b) Tariff publications filed with the Commission must conform to the rules in this part. Failure to comply with any provision of this part may be grounds for rejection of the non-complying publication.

(c) No carrier required to file tariffs may provide any interstate or foreign communication service until every tariff publication for such communication service is on file with the Commission and in effect.

§ 61.1 Application; effective date.

Every tariff, supplement, revised page, additional page, instrument of concurrence, notice of revocation, adoption notice and any other schedule of charges or regulations, which is filed with the Commission on and after the first day of September, 1939, pursuant to section 203 of the Communications Act of 1934, as amended, shall conform to the rules in this part.

§ 61.31 Application.

The rules contained in §§ 61.32 to 61.37 shall apply to all tariff publications.

§ 61.51 Application.

In addition to the rules contained in §§ 61.31 to 61.37, the rules contained in §§ 61.52 to 61.74 shall apply to all tariffs and supplements.

§ 61.69 Rejections.

(c) Failure of the carrier to comply with any provision of this part will be grounds for rejection of the tariff material being submitted for filing.

§ 61.91 Application.

In addition to the rules contained in §§ 61.31 to 61.37 and §§ 61.51 to 61.71, the rules published herein (§§ 61.91 to 61.96) shall apply to book and pamphlet tariffs and supplements.

§ 61.111 Application.

In addition to the rules contained in §§ 61.31 to 61.37 and §§ 61.51 to 61.71, the rules published herein (§§ 61.111 to 61.119) shall apply to loose-leaf tariffs.

§ 61.133 Tariffs and concurrences must be filed before service may be rendered.

No carrier whatsoever may engage or participate in any interstate or foreign communication service between any points unless and until every tariff publication of every carrier containing all charges and regulations for itself and its connecting carriers, and the concurrence of every concurring carrier, for such communication service is on file with the Commission and in effect except as provided in § 61.138.

§ 61.2 Clear and explicit explanatory statements.

EXPLANATION

Relocated from § 61.55(f) and restated for clarity.

PROPOSED RULE

§ 61.2 Clear and explicit explanatory statements.
In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

§ 61.55 Composition of tariffs.

(f) *Clear and explicit explanatory statements.* Such explanatory statements in clear and explicit terms regarding the rates and regulations contained in the tariff as may be necessary to remove all doubt as to their proper application.

DEFINITIONS (§§ 61.11 - 61.26)

EXPLANATION

Generally speaking, the definitions have been clarified and reorganized. Additions and deletions are as follows:

Additions

§ 61.12(b) Connecting Carrier. Definition now sets out language of Section 2(b)(2) of Act rather than cross-referencing it.

§ 61.12(e) Other participating carrier. Though used elsewhere in the Rules, this term was not explicitly defined in the previous definitions.

§ 61.15 Commercial Contractor. Long used elsewhere in Rules; here defined for first time.

§ 61.21 Rate. Used interchangeably with charge in the previous edition, this term has been defined to end that ambiguity and distinguish the two terms.

§ 61.22 Supplement. Though used elsewhere in the Rules, this term was not previously defined explicitly.

§ 61.23 Tariff. Though used elsewhere in the Rules, this term was not previously defined explicitly.

§ 61.26 United States. Explicitly defined as stated in the Communications Act.

Deletions

§ 61.15a(a) Dominant/non-dominant carrier. Not necessary.

§ 61.17 Posted. Consolidated into proposed § 61.72.

§ 61.19 Submarine cable. Archaic.

§ 61.21(a) V&H Coordinates. Consolidated into proposed § 61.58(b)(2)(i).

§ 61.21(d) Imposition of Termination Charges. Consolidated into proposed § 61.58(b)(2)(i).

PROPOSED RULE

§ 61.11 Act.
The Communications Act of 1934 (48 Stat. 1004; 47 U.S.C. Chapter 5), as amended.

§ 61.11 Act.

The term "act," whenever used in this part, means the Communications Act of 1934, (48 Stat. 1064; 47 U.S.C. Chapter 5) as amended.

§ 61.12 Carriers.

(a) Concurring carrier. A carrier (other than a connecting carrier) subject to the Act which concurs in and assents to schedules of rates and regulation filed on its behalf by an issuing carrier or carriers.

(b) Connecting Carrier.
A carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier.

(c) Issuing Carrier.
A carrier subject to the Act which publishes and files a tariff or tariffs with the Commission.

(d) Non-Dominant Carrier.
A carrier found by the Commission not to have market power (i.e., power to control prices).

(e) Other Participating Carrier.
A carrier subject to the Act which publishes a tariff containing rates and regulations applicable to the portion of through service it furnishes in conjunction with another subject carrier.

§ 61.13 Change in Rate Structure.
A restructuring of the rate components for an existing service.

§ 61.14 Changes.
The price for service based on tariffed rates.

§ 61.14 Concurring carrier.

The term "concurring carrier," whenever used in this part, means a carrier (other than a connecting carrier) subject to the act which concurs in and assents to schedules of charges and regulations filed on its behalf by an issuing carrier or carriers.

§ 61.15 Connecting carrier.

The term "connecting carrier," whenever used in this part, means a carrier described in clause (2) of section 2(b) of the act.

§ 61.16 Issuing carrier.

The term "issuing carrier," whenever used in this part, means a carrier subject to the act which publishes and flies a tariff or tariffs with the Commission.

§ 61.15a Dominant/non-dominant carrier.

(b) The term non-dominant carrier whenever used in this part means carriers not found to be dominant. This definition shall not apply to carriers providing mobile radio service, Multipoint Distribution Service, or international record or voice service.

§ 61.21 Categories of tariff filings.

(e) The term "change in rate structure" means a restructuring of the rate elements for an existing service.

§ 61.12 Charges.

The term "charges," whenever used in this part, shall be construed to include rates.

§ 61.15 Commercial Contractor.
The commercial firm to whom the Commission annually awards a contract to make copies of Commission records for sale to the public.

[old § 61.15a(a) definition of dominant carrier deleted as not necessary]

§ 61.16 Commission.
The Federal Communications Commission.

§ 61.17 Corrections.
The remedy of errors in typing, spelling, or punctuation.

[old § 61.17 Posted consolidated into proposed § 61.72]

§ 61.18 New Service Offering.
A tariff filing which provides for a class or sub-class of service not previously offered.

§ 61.19 Rate.
The tariffed price per unit of service.

[old § 61.19 Submarine cable deleted as archaic]

§ 61.20 Rate Increase.
Any change in a tariff which results in an increased rate or charge to any of the filing carrier's customers.

§ 61.15a Dominant/non-dominant carrier.

(a) The term dominant carrier whenever used in this Part means a carrier found by the Commission to have market power (i.e. power to control prices.)

§ 61.13 Commission.

The term "Commission," whenever used in this part, means the Federal Communications Commission.

§ 61.21 Categories of tariff filings.

(b) The term "corrections" means the correction of errors in typing, spelling, punctuation, grammar or the like.

§ 61.21 Categories of tariff filings.

(f) The term "new service offering" means a tariff filing which provides for classes or sub-classes of service not previously offered.

§ 61.19 Submarine cable.

The term "submarine cable," whenever used in this part, means deep sea cable used in transoceanic communications.

§ 61.21 Categories of tariff filings.

(g) The term "rate increase" means a change in a tariff publication which results in an increased charge to any of the carrier customers.

§ 61.21 Regulations.
The body of carrier prescribed rules in a tariff governing the offering of service in that tariff including rules, practices, classifications and definitions.

[old § 61.21(a) V&H Coordinates consolidated into proposed § 61.58(b)(2)(i)]

[old § 61.21(d) Imposition of Termination Charges consolidated into proposed § 61.58(b)(2)(i)]

§ 61.22 Supplement.
A publication filed as part of a tariff for the purpose of revising any schedule of rates or regulations in that tariff, and numbered independently from the tariff page series.

§ 61.23 Tariff.
Schedules of rates and regulations filed by common carriers.

§ 61.24 Tariff Publication, or Publication.
A tariff, supplement, revised page, additional page, concurrence, notice of revocation, adoption notice, or any other schedule of rates or regulations.

§ 61.25 Text Change.
A change in the text of a tariff which does not result in a change in any rate or regulation.

§ 61.26 United States.
The several States and Territories, the District of Columbia, and the possessions of the United States.

§ 61.18 Regulations.

The term "regulations," whenever used in this part, shall be construed to include rules, practices, and classifications.

§ 61.20 Tariff publication.

The term "tariff publication," or "publication," whenever used in this part, means a tariff, supplement, revised page, additional page, instrument of concurrence, notice of revocation, adoption notice, or any other schedule of charges or regulations.

§ 61.21 Categories of tariff filings.

(c) The term "text change" means a change in the text of a tariff which does not result in a change in any rate or regulation.

GENERAL RULES

§ 61.31 Deleted.

EXPLANATION

Now incorporated in § 61.1(b).

§ 61.32 Method of filing publications.

EXPLANATION

§ 61.32 clarifies the former text and changes it in two respects: by requiring that an additional copy of the tariff pages be submitted to the Secretary, and by eliminating the requirement that a copy of supporting information be filed with the Secretary.

PROPOSED RULE

§ 61.32 Method of filing publications.

Publications sent for filing must be addressed to "Secretary, Federal Communications Commission, Washington, D.C. 20554." Two copies of tariff publications must be filed under a letter of transmittal. The date on which the publication is received by the Secretary of the Commission, or by the Mail Room where submitted by mail, is considered the official filing date. Simultaneously with the filing of the publication, and by the same means, the issuing carrier must send a copy of the publication, supporting information specified in Section 61.38, and transmittal letter to (1) the commercial contractor (at its office on Commission premises) and (2) the Chief, Tariff Review Branch. The latter should be clearly labelled as the "Public Reference Copy." The copies of supporting information required here are in addition to those required by Section 61.38(c).

§ 61.32 Method of filing publications.

Tariff publications sent for filing shall be addressed to "Secretary, Federal Communications Commission, Washington, D.C. 20554." One copy of each publication, including all supporting information, shall be filed under a letter of transmittal. The date on which the tariff publication is filed with the Secretary shall be considered the official filing date. Simultaneously with the filing of the publication with the Secretary of the Commission and by the same means (hand delivery or mail), the filing carrier shall send a copy of the entire publication with all supporting information and the transmittal letter 1) to the commercial firm (at its office on the Commission's premises) to whom the Commission annually awards a contract to make copies of Commission records and offer them for sale to the public, and 2) to the Chief, Tariff Review Branch. The copy filed with the Tariff Review Branch shall be clearly labelled "Public Reference Copy."

§ 61.33 Letters of Transmittal.

EXPLANATION

§ 61.33(a) consolidates existing § 61.33 with § 61.39(a), and expands the information required with tariff transmittals. Specifically, enumerated items of information other than (1) represent newly detailed requirements.

§ 61.33(b) is clarified.

PROPOSED RULE

§ 61.33 Letters of Transmittal.

(a) All publications filed with the Commission must be accompanied by a letter of transmittal, 81/2 by 11 inches in size. All letters of transmittal must (1) concisely explain the nature and purpose of the filing; (2) specify whether supporting information under Section 61.38 is required; (3) state whether copies have been delivered to the Commercial Contractor and Chief, Tariff Review Branch as required by Section 61.32.

§ 61.33 Letters of transmittal.

(a) All publications filed with the Commission shall be accompanied by a letter of transmittal, 81/2 by 11 inches in size, in form substantially as follows:

(Exact name of carrier in full)
Tariff Department,
____
(Post Office Address)
____________________, 19__
(Date)

Transmittal No. ____
Secretary,
Federal Communications Commission,
Washington, D.C. 20554.
Attention: Common Carrier Bureau

The accompanying tariff (or other publication) is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended, issued by ____________________, and bearing FCC (Carrier) No. __, effective ____________, 19__ (Suppl. No. __ to FCC No. __, effective ____________, 19__.) (__ revised page __ of FCC No. __, effective ____________, 19__.) (FCC Concurrence No. __, effective ____________, 19__). etc. (Here give a statement describing the method of giving the additional notice required by §61.58).

____
(Name of issuing officer)

____
(Title)

(c) A statement giving a concise explanation of the nature and purpose of the filing shall be included in the transmittal prescribed above.

§ 61.39 Tariff filings for service offerings by non-dominant carriers.

(a) Every tariff filing of a non-dominant carrier shall be accompanied with a statement (preferably in the letter of transmittal) which shall briefly summarize the filing, its purpose, and whether any prior Commission facility authorization necessary to its implementation has been obtained.

(b) In addition to the requirements set forth in (a), the letter of transmittal must specifically reference by number any facility authorization or special permission necessary to implement the tariff publication. Special permission

must be granted prior to the filing of the tariff publication, and may not be requested in the transmittal letters.

(c) The letter of transmittal must be substantially in the following format.

(Exact name of carrier in full)

(Post Office Address)

_______________________, 19_____

(Date)

Transmittal No. _____
Secretary,
Federal Communications Commission,
Washington, D.C. 20554

ATTENTION: Common Carrier Bureau

The accompanying tariff (or other publication) issued by ____, and bearing FCC No. ____, effective ____, 19 __, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. (Here give the additional information required).

____

(Name of issuing officer or agent)

(Title)

§ 61.33 Letters of transmittal.

(a) All publications filed with the Commission shall be accompanied by a letter of transmittal, 81/2 by 11 inches in size, in form substantially as follows:

(Exact name of carrier in full)
Tariff Department,
____
(Post Office Address)
_________________________, 19__
(Date)

Transmittal No. ___
Secretary,

Federal Communications Commission,
Washington, D.C. 20554.
Attention: Common Carrier Bureau

The accompanying tariff (or other publication) is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended, issued by ____, and bearing FCC
(Carrier)
No. __, effective ____________________, 19__ (Suppl. No. __ to FCC No. __, effective ________________________ 19__.) (__ revised page __ of FCC No. __, effective _______________________, 19__.) (FCC Concurrence No. __, effective _______________________, 19__), etc. (Here give a statement describing the method of giving the additional notice required by §61.53).

(Name of issuing officer)

(Title)

(d) A separate letter of transmittal may accompany each publication, or the above format may be modified to provide for filing as many publications as desired with one transmittal letter.

Note: If a receipt for the accompanying publication is desired, the letter of transmittal must be sent in duplicate. One copy showing the date of receipt by the Commission will then be returned to the sender.

(b) A separate letter of transmittal may accompany each publication, or the foregoing form may be modified to provide for filing with one letter as many publications as can be conveniently entered.

Note: If receipt for accompanying publication is desired, the letter of transmittal must be sent in duplicate. One copy showing the date of receipt by the Commission will then be returned to the sender.

§ 61.34 Deleted.

EXPLANATION

Deleted in an earlier revision.

§ 61.35 Delivered free of charges.

EXPLANATION

No change.

PROPOSED RULE

§ 61.35 Delivered free of charges. Tariff publications must be delivered to the Commission free from all charges, including claims for postage.

§ 61.36 Tariff publications not returned.

EXPLANATION

New § 61.36 ends the practice of returning tariffs to carriers when rejected.

PROPOSED RULE

§ 61.36 Tariff publications not returned. Tariff publications will not be returned.

§ 61.37 Deleted.

EXPLANATION

Consolidated with new § 61.52(a).

§ 61.34 [Reserved]

[*§ 61.34 deleted & reserved eff. 12-19-79; X (77)-3*]

§ 61.35 Delivered free of charges.

No tariff publication will be received by the Commission unless it is delivered free from all charges, including claims for postage.

§ 61.36 Not returned unless rejected for cause.

Tariff publications which have been tendered to the Commission for filing or which have been received by the Commission in the ordinary course of business will not be returned to carriers, unless rejected for cause.

§ 61.38 Supporting information to be submitted with letters of transmittal.

EXPLANATION

Substantively unchanged since recent amendments except for the inclusion in § 61.38(a) of language now found in §§ 61.39(b) and (d) and the proposed expansion of the exemption in 61.38(a) to $500,000. (Amendment of Section 61.38, FCC 82–436, October 8, 1982).

PROPOSED RULE

§ 61.38 Supporting information to be submitted with letters of transmittal.

(a) *Scope.* This section applies to dominant carriers whose annual gross revenues exceed $500,000 for the most recent 12 month period of operations or are estimated to exceed $500,000 for a representative 12 month period. However, the Commission may require any carrier to submit such information as may be necessary for review of a tariff filing.

(b) *Explanation and data supporting either changes or new tariff offerings.* The material to be submitted for a tariff change which affects rates or charges or for a tariff offering a new service, must include an explanation of the changed or new matter, the reasons for the filing, the basis of ratemaking employed, and economic information to support the changed or new matter.

(1) For a tariff change, the carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A cost of service study for all elements for the most recent 12 month period;

§ 61.38 *Material to be submitted with letters of transmittals.*

(a) Explanation and data supporting changes and/or new tariff offering. The material to be submitted for a tariff change or for a tariff offering a new service must include: (1) an explanation of the changed or new matter, the reasons for the filing, and the basis of ratemaking employed; and (2) economic data and information to support the changed or new matter, including:

(i) For changed matter, a cost of service study for all elements of costs for the most recent 12-month period; and for changed and new matter, a study containing a projection of costs for at least a one-year period from the date of the filing of the tariff matter; and

(ii) A study containing a projection of costs for a representative 12 month period; and

(iii) Estimates of the effect of the changed matter on the traffic and revenues from the service to which the changed matter applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (ii) above.

(2) For a tariff filing offering a new service, the carrier must submit the following, including complete explanations of the bases for the estimates.

(i) A study containing a projection of costs for a representative 12 month period; and

(ii) Estimates of the effect of the new matter on the traffic and revenues from

the service to which the new matter applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for the same representative 12 month period used in (i) above.

(c) *Working papers and statistical data.* (1) Concurrently with the filing of any tariff change or tariff filing for a service not previously offered, the Chief, Tariff Review Branch must be provided two sets of working papers containing the information underlying the data supplied in response to paragraph (b) of this section, and a clear explanation of how the working papers relate to that information.

(ii) Estimates of the effect of the changed or new matter upon the traffic and revenues from the service to which the changed or new matter applies; upon the traffic and revenues from he carrier's other service classifications; and upon the carrier's overall traffic and revenues. Estimates must include the projected effects on the traffic and revenue data for a one year period from the date of the filing of the changed or new matter. Complete explanations of the bases for the estimates must be provided.

(b) Working papers and statistical data. (1) The Chief, Common Carrier Bureau, upon the filing of any tariff change or tariff filing for a service not previously offered, must be provided one set of working papers for use by the staff and a second set of working papers for use by the public at the Commission's offices. Each set of working papers must contain the information underlying the data supplied in response to paragraph (a) of this section, and a clear explanation of how the working papers relate to that information.

(2) All statistical studies must be submitted and supported in the form prescribed in Section 1.363 of this chapter.

(c) Submission of explanation and data by connecting carriers. If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, the connecting carrier must provide the data and information in paragraphs (a) and (b) of this section on the date the tariff matter is filed with the Commission by the issuing carrier.

(2) All statistical studies must be submitted and supported in the form prescribed in Section 1.363 of the Commission's Rules.

(d) *Form and content of material to be submitted with certain rate increases.* In the circumstances set out in (1) and (2) below, the filing carrier must submit all additional cost, marketing and other data underlying the working papers to justify a proposed rate increase. The carrier must submit this information in suitable form to serve as the carrier's direct case in the event the rate increase is set by the Commission for investigation.

(1) Rate increases affecting single services or tariffed items.

(i) A rate increase in any service or tariffed item which results in more than $1 million in additional annual revenues, calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues; or

(ii) A single rate increase in any service or tariffed item, or successive rate increases in the same service or tariffed item within a 12 month period, either of which results in:

(a) at least a 10 per cent increase in annual revenues from that service or tariffed item, and

(b) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(2) Rate increases affecting more than one service or tariffed item.

(d) Form and content of material submitted with certain rate increases. (1) The filing carrier must submit all costs, marketing and other data on which it relies in justification of a proposed rate increase when:

(i) a rate increase in any service or tariffed item results in more than $1 million in additional annual revenues, as calculated on the basis of existing quantities of service, without regard to the percentage increase in such revenues; or

(ii) a rate increase in any service or tariff item results in (a) a 10 per cent of greater increase in annual revenues from that service or tariffed item, and (b) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities of service; or for two or more rate increases applying to the same service or tariffed item during any consecutive 12 months which, when combined, result in both conditions set forth above in (a) and (b).

(2) The data required by subparagraph (1) must be in appropriate form to serve as the carrier's direct case in the event the rate increase is set for hearing. If the rate increase is designated for hearing, the carrier must submit any additional information on which it relies in documentary form within 45 days from the date of designation.

(3) The requirement imposed here is in addition to any requirement imposed by the other provisions of this section.

(i) A general rate increase in more than one service or tariffed item occurring at one time, which results in more than $1 million in additional revenues calculated on the basis of existing quantities in service, without regard to the percentage increase in such revenues; or

(ii) A general rate increase in more than one service or tariffed item occurring at one time, or successive general rate increases in the same services or tariffed items occurring within a 12 month period, either of which results in:

(a) at least a 10 per cent increase in annual revenues from those services or tariffed items, and

(b) at least $100,000 in additional annual revenues, both calculated on the basis of existing quantities in service.

(e) *Submission of explanation and data by connecting carriers*. If the changed or new matter is being filed by the issuing carrier at the request of a connecting carrier, the connecting carrier must provide the data and information required by paragraphs (b) and (c) of this section on the date the issuing carrier files the tariff matter with the Commission.

(f) *Copies of explanation and data to customers*. Concurrently with the filing of any rate for special construction (or special assembly equipment and arrangements) developed on the basis of estimated cost, the offering carrier must transmit to the customer a copy of the explanation and data required by paragraphs (b) and (c) of this section.

(e) Copies of explanation and data to customers. Concurrently with the filing of any rate for special construction (or special assembly equipment and arrangements) developed on the basis of estimated cost, the offering carrier must transmit to the customer a copy of the explanation and data required by paragraphs (a) and (b) of this section.

(f) Exception. This section does not apply to non-dominant carriers, and in any event does not apply to any carrier with annual gross revenues less than $200,000. Annual gross revenues are to be calculated on the basis of gross revenues for the most recent twelve month period, or on the basis of the average of three years' estimated annual gross revenues, whichever is greater.

§ 61.39 Tariff filings for service offerings by non-dominant carriers.

(b) Except as provided in paragraph (d) of this section, tariff filings involving domestic service of carriers found by the Commission to be non-dominant need not be accompanied by the support material required by § 61.38.

(d) The Commission may, at any time, request of any carrier filing tariffs pursuant to this Section to submit any information or data necessary to determine the lawfulness of any tariff filing. In such event, the carrier shall be prepared to submit such information within seven (7) calendar days (or longer period established by the Chief of the Common Carrier Bureau) of the date it is requested.

§ 61.39 Deleted.

EXPLANATION

Relocated existing paragraphs (a), (b), (c) and (d) to proposed §§ 61.33(a), 61.38(a), 1.773(a)(ii) and 61.38(a) respectively.

SPECIFIC RULES FOR TARIFF PUBLICATIONS

§ 61.51 Deleted

EXPLANATION

Consolidated in 61.1(b).

§ 61.52 Form, size, type, legibility, etc.

EXPLANATION

§ 61.52(a) consolidates old § 61.52 and § 61.37, and deletes certain archaic language.

§ 61.52(b) relocates and consolidates old § 61.92 and § 61.112 with related material in original § 61.52(b), and authorizes an alternative form for tariff pages. (The alternative form has frequently been permitted by waiver in the past.)

PROPOSED RULE

§ 61.52 Form, size, type, legibility, etc.

(a) All tariff publications must be in loose-leaf form of size 81/2 by 11 inches, and must be plainly printed in black print on white paper of durable quality. Less than 6-point type may not be used. Erasures or alterations in writing must not be made in any tariff publication filed with the Commission or in those copies posted for public convenience. A margin of no less than one inch in width must be allowed at the left edge of every tariff publication.

§ 61.37 Erasures and alterations; margins.

Erasures or alterations in writing shall not be made in any tariff publication filed with the Commission or in those posted for public convenience, and a sufficient margin without any printing thereon shall be allowed at the binding edge of every tariff and supplement so that, when the book or binder containing the tariff or supplement is open, all printed matter on each page will be clearly in view and legible, but the margin shall in no event be less than five-eights of an inch in width.

§ 61.52 Form, size, type, legibility, etc.

All tariffs and supplements shall be in book, pamphlet, or loose-leaf form of size 81/2 by 11 inches, and shall be plainly printed on hard calendered, No. 1 machine-finished book or 20-pound bond paper of durable quality. Type of size not less than 6-point shall be used, except as provided in § 61.54(a). Stereotype, planograph, mimeograph, or other process equally durable may be used, provided that the copies posted and filed are clear and legible in all respects. Reproductions by hectograph, typewriter or similar process shall not be used.

(b) Pages of tariffs must be printed on one side only, and must be numbered consecutively and designated as "Original title page," "Original page 1," "Original page 2," etc.

(1) All such pages must show, in the upper left-hand corner the name of the issuing carrier; in the upper right-hand corner the FCC number of the tariff, with the page designation directly below; in the lower left-hand corner the issued date; in the lower right-hand corner the effective date; and at the bottom, center, the street address of the issuing officer. The carrier must also specify the issuing officer's name and title either at the bottom center of all tariff pages, or on the title page and check sheet only.

(2) As an alternative, the issuing carrier may show in the upper left-hand corner the name of the issuing carrier, the name, title, and street address of the issuing officer, and the issued date; and in the upper right hand corner the FCC number of the tariff, with the page designation directly below, and the effective date. The carrier must specify the issuing officer's name and title in the upper left-hand corner of either all tariff pages, or on the title page and check sheet only. A carrier electing to place the information at the top of the page should annotate the bottom of each page to indicate the end of the material, e.g., a line, or the term "Printed in USA," or "End."

(3) Only one format may be employed in a tariff publication.

§ 61.92 Construction.

The pages of each tariff or supplement shall be numbered consecutively, beginning with the title page and counting each side of a sheet as a page. Each page which is left blank shall bear the notation: "This page intentionally left blank."

§ 61.112 Construction.

Pages of loose-leaf tariffs shall be printed only on one side of the sheet, and they must be numbered consecutively and designated as "Original title page," "Original page 1," "Original page 2," etc. All such pages shall show, in the upper left-hand corner the name of the issuing carrier; in the upper right-hand corner the FCC number of the tariff in distinctive type, with the page designation directly thereunder; in the lower left-hand corner the date of issue; in the lower right-hand corner the date effective; and at the bottom, center, the name, title, and street address of the issuing officer.

§ 61.53 Consecutive numbering.

EXPLANATION

No substantive change.

PROPOSED RULE

§ 61.53 Consecutive numbering.

Carriers should file tariff publications under consecutive FCC numbers. If this cannot be done, a memorandum containing an explanation of the missing number or numbers must be submitted. Supplements to a tariff must be numbered consecutively in a separate series.

§ 61.53 Consecutive numbering.

Each carrier shall, so far as practicable, file tariffs under consecutive FCC numbers. If for any cause this cannot be done, the tariff which is filed bearing an FCC number that is not consecutive with the last number filed shall be accompanied by a memorandum containing an explanation of the missing number or numbers. Supplements to a tariff shall be numbered consecutively.

§ 61.54 Composition of tariffs.

EXPLANATION

New § 61.54 consolidates material from old §§ 61.54, 61.55, 61.94, 61.113, 61.114, 61.115, 61.118 and 61.119. As is set forth in more detail below, these organizational changes primarily effect greater clarity of exposition and the elimination of redundancies in formerly scattered sections. Minor substantive changes have been made as indicated.

§ 61.54(a) summarizes in a new paragraph the elements of a tariff formerly set out only as paragraph headings.

§ 61.54(b) sets out format and information required on tariff title pages (formerly contained in §§ 61.54(a), (b), (c)(1), (e), and 61.119).

§ 61.54(c) sets out procedures for original and subsequent pagination of tariffs formerly contained in §§ 61.113(a) and (b), § 61.114, and § 61.115, and adds a cross-reference to rejected pages, covered by proposed § 61.69.

§ 61.54(d) sets out requirements of the table of contents (old § 61.55(a)) without substantive change.

§ 61.54(e) is a new paragraph authorizing carriers to include optional material in tariffs to assit users.

§ 61.54(f) sets out requirements for list of concurring carriers, formerly contained in § 61.55(b).

§ 61.54(g) sets out requirements for list of connecting carriers, formerly contained in § 61.55(c).

§ 61.54(h) sets out requirement for list of other participating carriers, formerly contained in § 61.55(d).

§ 61.54(i) specifies and explains use of prescribed symbols, reference marks and abbreviations formerly contained in § 61.55(e), § 61.94, and §§ 61.118(a) and (b). Adds symbols to denote matter relocated without change (M) and corrections (Z).

§ 61.54(j) sets out requirement that carrier's regulations governing the tariff be stated clearly, formerly contained in § 61.55(g). Specifies for the first time that the general rules of the tariff include definitions, to preclude contentions that definitions are not legally part of the tariff.

§ 61.54(k) states requirement of former § 61.55(h) that rates be explicitly stated.

PROPOSED RULE

§ 61.54 Composition of tariffs.

(a) Tariffs must contain, in consecutive order: a title page; check sheet; table of contents; list of concurring, connecting, and other participating carriers; explanation of symbols and abbreviations; application of tariff; general rules (including definitions), regulations, exceptions and conditions; and rates. If

the issuing carrier elects to add a section assisting in the use of the tariff, it should be placed immediately after the table of contents.

(b) The title page of every tariff and supplement must show:

(1) *FCC number, indication of cancellations.* In the upper right-hand corner, the designation of the tariff or supplement as "FCC No. ____ ," or "Supplement No. ____ to FCC No. ____ ," and immediately below, the FCC number or numbers of tariffs or supplements cancelled thereby.

(2) *Name of carrier, class of service, geographical application, means of transmission.* The exact name of the carrier, and such other information as may be necessary to identify the carrier issuing the tariff publication; a brief statement showing each class of service provided; the geographical application; and the type of facilities used to provide service.

(3) *Expiration Date.* When the entire tariff or supplement is to expire with a fixed date, the expiration date must be shown in connection with the effective date in the following manner:

Expires at the end of ____ (date) unless sooner cancelled, changed or extended.

§ 61.54 Title page, contents and arrangements.

The title page of every tariff and supplement shall show in the order named:

(a) *FCC number, indication of cancellations.* On upper right-hand corner, the designation of the tariff or supplement as "FCC No. ____ ," or "Supplement No. ____ to FCC No. ____ ," in not less than 12-point bold face type, and immediately thereunder the FCC number or numbers of tariffs or supplements canceled thereby. If the canceled issues are so numerous as to render it impracticable thus to enter the numbers thereof on the title page, the numbers thereof shall be shown immediately following the table of contents and specific reference to that fact shall be entered on the title page directly under the FCC number. Each supplement shall specify on its title page the supplement or supplements which it amends.

(b) *Name of carrier, class of service, geographical application, means of transmission.* The exact name of the carrier and such other information as may be necessary positively to identify such carrier, including a receiver or receivers, if any, issuing the tariff or supplement; a brief statement showing each class of service provided therein; the geographical application of the tariff or supplement; and whether such service is carried on by wire or submarine cable telegraph, wire or submarine cable telephone, radiotelegraph or radiotelephone.

(c) *Issue, effective and expiration dates.* (1) Date of issue in lower left-hand corner, and date effective in lower right-hand corner. When the entire tariff or supplement is to expire with a fixed date, the expiration date shall be shown in connection with the effective date in the following manner:

Expires with ________ (date) unless sooner canceled, changed or extended.

(4) *Name, title and address of issuing officer.* The name, title and street address of the officer issuing the tariff or supplement in the format specified in Section 61.52.

(5) *Revised title page.* When a revised title page is issued, the following notation must be shown in connection with its effective date:

Original tariff effective ____ (here show the effective date of the original tariff).

(c) (1) The page immediately following the title page must be designated as "Original page 1" and captioned "Check Sheet." When the original tariff is filed, the check sheet must show the number of pages contained in the tariff. For example, "Page 1 to 150, inclusive, of this tariff are effective as of the date shown." When new pages are added, they must be numbered in continuing sequence, and designated as "Original page ____." For example, when the tariff filed has 150 pages, the first page added after page 150 is to be designated as "Original page 151," and the foregoing notation must be revised to include the added pages.

§ 61.54 Title page, contents and arrangements.

(e) *Name, title and address of issuing officer.* The name, title and street address of the officer issuing the tariff or supplement.

§ 61.119 Revised title pages.

When a revised title page is issued, the following notation shall be shown in connection with its effective date:

Original tariff effective ________ (Here show the effective date of the original tariff)

§ 61.113 Check sheet.

(a) The page of every loose-leaf tariff next to the title page shall be designated as "Original page 1" and shall be known as a "Check sheet." When the original tariff is filed, the check sheet shall show the number of pages contained in the tariff. For example, "Pages 1 to 150, inclusive, of this tariff are effective as of the date shown." When new pages are added, such as pages numbered 151, 152 and so on, the foregoing notation shall be correspondingly revised to include the added pages. When pages are revised, when new pages (including pages with letter suffix) are added to the tariff, or when supplements are issued, the check sheet shall be revised accordingly, and, in addition to the above notation, shall show, under the heading "Original and revised pages as named below (and Supplement No. –) contain all changes from the original tariff that are in effect on the date hereof," in numerical order a list of all original pages that have been added to the tariff and the pages which have been revised, including the revision number. For example:

Page	*Number of revision except as indicated*
Title	1st
3	5th
5A	Orig.
10	8th
151	Orig.

§ 61.115 Additional pages.

If it is desired to file additional pages to a loose-leaf tariff, such pages shall be numbered beginning with the number next succeeding the number of the last page of the tariff, and shall be designated as "Original page –." For example, when the tariff filed has 150 pages, the first page added after page 150 shall be designated as "Original page 151." If such pages are to be inserted between numbered pages, each such page shall be designated as an original page and shall bear the number of the immediately preceding page followed by the suffix A, B, C, and so on. For example, when two new pages are to be inserted between pages 44 and 45 of the tariff, the first page shall be designated as original page 44A and the second page as original page 44B. No additional page can be filed except for the purpose of adding new matter which does not change the charges or regulations then in force on other pages of the tariff.

(2) If pages are to be inserted between numbered pages, each such page must be designated as an original page and must bear the number of the immediately preceding page followed by an alpha or numeric suffix. For example, when two new pages are to be inserted between pages 44 and 45 of the tariff, the first inserted page must be designated as Original page 44A or 44.1 and the second inserted page as Original page 44B or 44.2. Issuing carriers may not utilize both the alpha and numeric systems in the same publication.

(3) When pages are revised, when new pages (including pages with letter or numeric suffix as set forth above) are added to the tariff, or when supplements are issued, the check sheet must be revised accordingly. Revised check sheets must indicate with an asterisk the specific pages added or revised. In addition to the notation, the check sheet must list, under the heading "The original and revised pages named below (and Supplement No. ____) contain all changes from the original tariff that are in effect on the date shown," all original pages in numerical order that have been added to the tariff and the pages which have been revised, including the revision number. For example:

Page	***Number of revision except as indicated***
Title	**1st**
1	**8th***
3	**5th**
5A	**Orig.***
10	**8th***
151	**Orig.**

*** Page Issued ____ (date).**

§ 61.115 Additional pages.

If it is desired to file additional pages to a loose-leaf tariff, such pages shall be numbered beginning with the number next succeeding the number of the last page of the tariff, and shall be designated as "Original page –." For example, when the tariff filed has 150 pages, the first page added after page 150 shall be designated as "Original page 151." If such pages are to be inserted between numbered pages, each such page shall be designated as an original page and shall bear the number of the immediately preceding page followed by the suffix A, B, C, and so on. For example, when two new pages are to be inserted between pages 44 and 45 of the tariff, the first page shall be designated as original page 44A and the second page as original page 44B. No additional page can be filed except for the purpose of adding new matter which does not change the charges or regulations then in force on other pages of the tariff.

§ 61.113 Check sheet.

(a) The page of every loose-leaf tariff next to the title page shall be designated as "Original page 1" and shall be known as a "Check sheet." When the original tariff is filed, the check sheet shall show the number of pages contained in the tariff. For example, "Pages 1 to 150, inclusive, of this tariff are effective as of the date shown." When new pages are added, such as pages numbered 151, 152 and so on, the foregoing notation shall be correspondingly revised to include the added pages. When pages are revised, when new pages (including pages with letter suffix) are added to the tariff, or when supplements are issued, the check sheet shall be revised accordingly, and, in addition to the above notation, shall show, under the heading "Original and revised pages as named below (and Supplement No. –) contain all changes from the original tariff that are in effect on the date hereof," in numerical order a list of all original pages that have been added to the tariff and the pages which have been revised, including the revision number. For example:

Page	*Number of revision except as indicated*
Title	1st
3	5th
5A	Orig.
10	8th
151	Orig.

(b) Revised check sheets listing the added or revised pages must accompany such pages when forwarded to the Commission for filing.

(4) Changes in, and additions to tariffs must be made by reprinting the page upon which a change or addition is made. Such changed page is to be designated as a revised page, cancelling the page which it amends. For example, "First revised page 1 cancels original page 1," or "Second revised page 2 cancels first revised page 2," etc. When a revised page omits rates or regulations previously published on the page which it cancels, but such rates or regulations are published on another page, the revised page must make specific reference to the page on which the rates or regulations will be found. This reference must be accomplished by inserting a sentence at the bottom of the revised page that states "Certain rates (or regulations) previously found on this page can now be found on page ____ ." In addition, the page on which the omitted material now appears must bear the appropriate symbol opposite such material, and make specific reference to the page from which the rates or regulations were transferred. This reference must be accomplished by inserting a sentence at the bottom of the other page that states "Certain rates (or regulations) on this page formerly appeared on page ____ ."

(5) Rejected pages must be treated as indicated in Section 61.69.

§ 61.114 Amendments.

Changes in, and additions to, loose-leaf tariffs shall be made by reprinting the page upon which a change or addition is made, and such changed page shall be designated as a revised page and shall cancel the page which it amends. For example, "First revised page 1 cancels original page 1," or "Second revised page 2 cancels first revised page 2," etc. When a revised page is issued which omits charges or regulations theretofore published on the page which it cancels and such charges or regulations are published on a page other than the revised page, the revised page shall make specific reference to the page on which the charges or regulations will be found.

(d) *Table of contents*. The table of contents must contain a full and complete statement showing the exact location and specifying the page or section and page numbers, where information by subjects under general headings will be found. If a tariff contains so small a volume of matter that its title page or its interior arrangement plainly discloses its contents, the table of contents may be omitted.

(e) *Tariff User's guide*. At its option, a carrier may include a section explaining how to use the tariff.

(f) *List of concurring carriers*. This list must contain the exact name or names of carriers concurring in the tariff, alphabetically arranged, and the name of the city or town in which the principal office of every such carrier is located. If there are no concurring carriers, then the statement "no concurring carriers" must be made at the place where the names of the concurring carriers would otherwise appear. If the concurring carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference to such separate tariff by FCC number must be made in the tariff at the place where such names would otherwise appear.

§ 61.55 Composition of tariffs.

Tariffs shall contain, in the order named, the following:

(a) *Table of contents*. A full and complete statement showing the exact location and specifying the page or section and page numbers, where information by subjects under general headings in alphabetical order, will be found. If a tariff contains so small a volume of matter that its title page or its interior arrangement plainly discloses its contents, the table of contents may be omitted.

§ 61.55 Composition of tariffs.

(b) *List of concurring carriers*. The exact name or names of the concurring carriers, alphabetically arranged, concurring in the tariff and the name of the city or town in which the principal office of every such carrier is located. (See §§ 61.131 and 61.132.) If there are no concurring carriers, then the statement "no concurring carriers" shall be made at the place where the names of the concurring carriers would otherwise appear. If the carriers so concurring are numerous, the names thereof may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier: *Provided*, That specific reference to such separate tariff by F.C.C. number is made in the tariff at the place where such names would otherwise appear.

(g) *List of connecting carriers*. This list must contain the exact name or names of connecting carriers, alphabetically arranged, for which rates or regulations are published in the tariff, and the name of the city or town in which the principal office of every such carrier is located. If there are no connecting carriers, then the statement "no connecting carriers" must be made at the place where their names would otherwise appear. If connecting carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference to such separate tariff by FCC number must be made in the tariff at the place where such names would otherwise appear.

(h) *List of other participating carriers*. This list must contain the exact name of every other carrier subject to the Act engaging or participating in the communication service to which the tariff or supplement applies, together with the name of the city or town in which the principal office of such carrier is located. If there is no such other carrier, then the statement "no participating carriers" must be made at the place where the names of such other carriers would otherwise appear. If such other carriers are numerous, their names may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier. Specific reference must be made in the tariff at the place where such names would otherwise appear. The names of concurring and connecting carriers properly listed in a tariff published by any other participating carrier need not be repeated in this list.

§ 61.55 Composition of tariffs.

(c) *List of connecting carriers*. The exact name or names, alphabetically arranged, of the connecting carriers, for which charges or regulations are published in the tariff and the name of the city or town in which the principal office of every such carrier is located. (See §§ 61.131 and 61.132.) If there are no connecting carriers, then the statement "no connecting carriers" shall be made at the place where the names of the connecting carriers would otherwise appear. If such connecting carriers are numerous, the names thereof may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier: *Provided*, That specific reference to such separate tariff by F.C.C. number is made in the tariff at the place where such names would otherwise appear.

§ 61.55 Composition of tariffs.

(d) *List of other participating carriers.* The exact name of every other carrier subject to the Act engaging or participating in the communication service to which the tariff or supplement applies, together with the name of the city or town in which the principal office of such carrier is located. (See § 61.132.) If there is no such other carrier, then the statement "no other participating carriers" shall be made at the place where the names of such other carriers would otherwise appear. If such other carriers are numerous, the names thereof may be stated in alphabetical order in a separate tariff filed with the Commission by the issuing carrier: *Provided*, That specific reference is made in the tariff at the place where such names would otherwise appear. The names of concurring and connecting carriers properly listed in a tariff published by any such other participating carrier need not be included in the aforementioned list.

(i) (1) *Symbols, reference marks, abbreviations.* The tariff must contain an explanation of symbols, reference marks, and abbreviations of technical terms used. The following symbols used in tariffs are reserved for the purposes indicated below:

R to signify reduction.
I to signify increase.
C to signify changed regulation.
T to signify a change in text but no change in rate or regulation.
S to signify reissued matter.
M to signify matter relocated without change.
N to signify new rate or regulation.
D to signify discontinued rate or regulation.
Z to signify a correction.

(2) The uniform symbols must be used as follows:

(i) When a change of the same character is made in all or in substantially all matter in a tariff, it may be indicated at the top of the title page of the tariff or at the top of each affected page, in the following manner: "All rates in this tariff are increases," or, "All rates on this page are reductions, except as otherwise indicated."

(ii) When a change of the same character is made in all or substantially all matters on a page or supplement, it may be indicated at the top of the page or supplement in the following manner: "All rates on this page (or supplement) are increases," or, "All rates on this page (or supplement) are reductions except as otherwise indicated."

§ 61.55 Composition of tariffs.

(e) *Symbols, reference marks, abbreviations.* Explanation of symbols, reference marks, and abbreviations of technicals terms used in tariffs. The following symbols shall be used in tariffs for the purposes indicated below and they shall not be used for any other purposes:

R to signify reduction.
I to signify increase.
C to signify changed regulation.
T to signify a change in text but no change in rate or regulation.
S to signify reissued matter.
N to signify new rate or regulation.
D to signify discontinued rate or regulation.

§ 61.94 Indication of changes.

Changes shall be indicated by the use of the uniform symbols shown in § 61.55(e):

Provided, however, That when a change of the same character is made in all or in substantially all matter in a tariff or supplement, or on any page thereof, that fact and the nature of such change may be indicated in distinctive type at the top of the title page of the tariff or supplement, or at the top of each page whereon the change is made, in the following manner: "All charges in this tariff (or supplement) are increases," or, "All charges on this page are reductions, except as otherwise provided in connection with specific rates." Under the latter provision, an appropriate symbol shall be used to indicate a charge or regulation in which no change has been made.

§ 61.118 Indication of changes.

(a) Changes shall be indicated by the use of the uniform symbols shown in § 61.55(e): *Provided, however,* That when a change of the same character is made in all or in substantially all schedules in a tariff, or on any page thereof, that fact and the nature of such change may be indicated in distinctive type at the top of the title page of the tariff, or at the top of each page whereon the change is made, in the following manner: "All charges in this tariff are increases." or "All charges on this page are reductions, except as otherwise provided in connection with specific rates." Under the latter provision, an appropriate symbol shall be used to indicate a charge or regulation in which no change has been made.

(3) Items which have not been in effect 30 days when brought forward on revised pages must be shown as reissued, in the manner prescribed in Section 61.54(i)(1). Items which have been in effect 30 days or more and are brought forward without change on revised pages must not be shown as reissued items.

(j) *Rates and general rules, regulations, exceptions and conditions.* The general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified. A special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate. Rates must be expressed in United States currency, per chargeable unit of service for all communication services, together with a list of all points of service to and from which rates apply. They must be arranged in a simple and systematic manner. Complicated or ambiguous terminology may not be used, and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition named in any other tariff.

§ 61.118 Indication of changes.

(b) Items which have been in effect 30 days or more and are brought forward without change on revised pages shall not be shown as reissued items but shall be published as effective on 30 days' notice. Items which have not been in effect 30 days when brought forward on revised pages shall be shown as reissued in the manner prescribed in § 61.71.

§ 61.55 Composition of tariffs.

(g) *General rules, regulations, exceptions, and conditions.* A clear and definite statement of the general rules, regulations, exceptions, and conditions which govern the tariff; the title or subject of each rule, regulation, exception, or condition to be shown in distinctive type. Under this head, all general rules, regulations, exceptions, or conditions which in any way affect the charges named in the tariff shall be entered. A special rule, regulation, exception or condition affecting a particular item or charge shall be specifically referred to in connection with such item or charge.

§ 61.55 Composition of tariffs.

(h) *Charges.* An explicit statement of the charges in cents or in dollars and cents of United States currency, per chargeable unit of service for all communication services, together with a list of the cities, towns, and localities to and from which message rates apply, all arranged in a simple and systematic manner. Complicated or ambiguous terms shall not be used, and no rule, regulation, exception, or condition shall be included which in any way attempts to authorize the substitution for any rate named in the tariff of a rate named in any other tariff. All charges used in making combination through rates for interstate or foreign communications, including charges used for that purpose between points in one State, shall be filed with the Commission.

§ 61.55 Deleted.

EXPLANATION

Consolidated in other rules, primarily proposed § 61.54.

§ 61.56 Supplements.

EXPLANATION

Consolidates material governing supplements formerly found in §§ 61.56 and 61.116.

PROPOSED RULE

§ 61.56 Supplements.

A carrier may not file a supplement except to suspend or cancel a tariff.

§ 61.56 Composition of supplements.

Matter contained in every supplement shall be arranged in the same manner and order as in the tariff which it amends.

§ 61.116 Supplements.

Except when a tariff is suspended, adopted or cancelled, or except as specially authorized, no supplement shall be filed to a loose-leaf tariff.

§ 61.57 Cancellations.

EXPLANATION

Preserves former § 61.57 unchanged except for deletion of § 61.57(e) as archaic.

PROPOSED RULE

§ 61.57 Cancellations. The following paragraphs govern the cancellation of tariffs and supplements.

(a) *By tariff or supplement.* A carrier may cancel any tariff or supplement in whole or in part by another tariff or supplement. Cancellation of a tariff automatically cancels every supplement to that tariff, except a cancelling supplement.

(b) *By expiration.* Subject to Section 61.59, a carrier may cancel a tariff or supplement in whole or in part by fixing a date on which the rates or regulations will expire.

(c) *Indication of.* (1) A carrier which cancels a tariff or supplement in whole by another tariff or supplement must comply with Section 61.54(b)(1). Cancellation of tariffs or supplements in whole by expiration must be indicated as provided in Section 61.54(b)(3).

(2) Where a carrier issues a tariff, supplement, or revised page partially

cancelling another tariff, supplement, or revised page, it must specifically state what portion of the other tariff publication is cancelled. Such other tariff or supplement must at the same time be correspondingly amended, effective on the same date.

(3) When only a part of a tariff or supplement is to expire, a carrier must show the expiration date on the same page, and associate it with the matter which is to expire. Changes in expiration date must be made pursuant to the notice requirements of Section 61.58, unless otherwise authorized by the Commission. Expirations must be indicated as follows:

Expires at the end of ____(date) unless sooner cancelled, changed or extended.

§ 61.57 Cancellations.

Tariffs and supplements shall be cancelled in the manner set forth in the following:

(a) *By tariff or supplement.* Any tariff or supplement may be cancelled in whole or in part by another tariff or supplement. Cancellation of a tariff automatically cancels every supplement thereto, except a cancelling supplement.

(b) *By expiration.* A tariff or supplement may be cancelled in whole or in part by fixing a date with which the charges or regulations shown therein shall expire subject to the rules contained in § 61.59.

(c) *Indication of.* (1) Cancellation of tariffs or supplements in whole by tariff or supplement shall be indicated as provided in § 61.54(a). Cancellation of tariffs or supplements in whole by expiration shall be indicated as provided in § 61.54(c).

(2) If a tariff or supplement or revised page is issued which is to cancel a part of another tariff or supplement then in force and not thereby cancelled in full, the new tariff, supplement or revised page shall specifically state what portion of such other tariff or supplement is thereby cancelled and such other tariff or supplement shall at the same time be correspondingly amended, effective on the same date.

(3) When only a part of a tariff or supplement is to expire the expiration date shall be shown in connection with and on the same page as the matter which is to expire. Changes in expiration date shall be made only on statutory notice unless otherwise authorized by the Commission. Expirations shall be indicated as follows:

Expires with ________ (date) unless sooner cancelled, changed or extended.

(d) *Charges and regulations to apply.* When a tariff or supplement is cancelled in whole or in part by a supplement, the supplement shall show where the charges and regulations will thereafter be found or what charges and regulations will thereafter apply. When a tariff or supplement is cancelled in whole or in part by another tariff which does not contain all the charges or regulations shown in the tariff or supplement or part to be cancelled, the cancelling tariff shall show where the charges and regulations not shown therein will thereafter be found or what charges and regulations will thereafter apply.

(d) *Rates and regulations to apply.* When a carrier cancels a tariff or supplement in whole or in part by another tariff or supplement, the cancelling publication must show where all rates and regulations will be found, or what rates and regulations will apply.

(e) *Omissions.* When a tariff or supplement cancelling a previous tariff or supplement omits points of origin or destination, rates or regulations, or routes, which were contained in such tariff or supplement, the new tariff or supplement must indicate the omission in the manner prescribed in paragraph (c) of this section. If such omissions effect changes in rates or regulations, that fact must be indicated by the use of the uniform symbols prescribed in Section 61.54(i)(1).

[old § 61.57(e) deleted as archaic]

(f) *Carriers ceasing operations.* Where a carrier ceases operations without a successor, it must cancel its tariffs pursuant to the notice requirements of Section 61.58, unless otherwise authorized by the Commission.

§ 61.57 Cancellations.

(f) *Omissions.* When a tariff or supplement cancelling a previous tariff or supplement omits points of origin or destination, charges or regulations, or routes, which were contained in such tariff or supplement, the new tariff or supplement shall indicate the cancellation in the manner prescribed in paragraph (c) of this section and if such omissions effect changes in charges or regulations, that fact shall be indicated by the use of the uniform symbols prescribed in § 61.55(e).

§ 61.57 Cancellations.

(e) *Items or numbered rules.* When portions of a tariff (excepting a tariff in loose-leaf form) or of a supplement are designated as items, the items shall be given numbers. When an item or numbered rule is cancelled by supplement, the item or rule in the cancelling supplement shall be given the same number as the cancelled item or rule, but a letter suffix shall be added to the cancelling item or rule. Cancellation shall then be made in the following manner: Item or rule 40-A cancels item or rule 40; item or rule 40-B cancels item or rule 40-A; and so on. When an item or rule is cancelled, the cancelled matter need not be reproduced in connection with the item or rule effecting the cancellation, except to the extent necessary to identify the item or rule.

§ 61.57 Cancellations.

(g) *Carriers ceasing operations.* If a carrier ceases operations without having a successor its tariffs shall be regularly cancelled on statutory notice, unless otherwise authorized by the Commission.

§ 61.58 Notice requirements.

EXPLANATION

Halves the longest notice periods now imposed on dominant carriers (61.58(c)(2) and 61.58(c)(3)). Also consolidates formerly scattered notice requirements affecting different types of carriers with differing underlying authority (old §§ 61.58, 61.60, 61.61, 61.62, 61.63); adds a new paragraph establishing an abbreviated notice period for corrections (§ 61.58(a)(3)); relocates §§ 61.21(a) and (d) to § 61.58(c)(1)(iii) to more closely associate these definitions with the only provisions employing them.

PROPOSED RULE

§ 61.58 Notice requirements.

(a) Every proposed tariff filing must bear an effective date and, except as otherwise provided by regulation, special permission, or Commission order, must be made on at least the number of days notice specified in this section.

(1) Notice is accomplished by filing the proposed tariff changes with the Commission. Any period of notice specified in this section begins on and includes the date the tariff is received by the Commission, but does not include the effective date. If a tariff filing proposes changes governed by more than one of the notice periods listed below, the longest notice period will apply. In computing the notice period required, all days including Sundays and holidays must be counted.

(2) The Chief, Common Carrier Bureau may require the deferral of the effective

date of any tariff filing made on less than 90 days' notice, so as to provide for a maximum total of 90 days' notice, regardless of whether petitions under Section 1.773 of the Commission's Rules have been filed.

§ 61.58 Notice requirements.

Every tariff publication or filing shall bear an effective date and, except as otherwise provided by regulation, special permission, or order of the Commission, shall give at least the number of days notice to the public and to the Commission specified hereinafter. If a new or revised tariff provision fits into more than one of the categories listed below, the longest period of public notice provided for shall apply. Notice shall be given by filing with the Commission such proposed tariff publications. In addition to this notice, if the tariff publication proposes to increase any charge or to effectuate an authorized discontinuance, reduction or other impairment of service to any customer, the filing carrier shall take such steps as are appropriate under the circumstances to inform the affected customers of the content of the tariff publication. Any period of notice required herein shall begin on and shall include the date the tariff is received by the Commission, but shall not include the effective date. In computing the notice required. Sundays and holidays shall be counted.

§ 61.58 Notice requirements.

(d) The Chief, Common Carrier Bureau may issue orders requiring the deferral of the effective date of any tariff filing made on less than 90 day's notice so as to provide for a maximum total of 90 day's notice to the public and to the Commission regardless of whether petitions opposing the tariff filing have been filed.

(3) Tariff filings proposing corrections must be made on at least 3 days' notice, and may be filed notwithstanding the provisions of Section 61.59. Corrections to tariff materials not yet effective cannot take effect before the effective date of the original material.

(4) If the tariff publication would increase any rate or charge, or would effectuate an authorized discontinuance, reduction or other impairment of service to any customer, the offering carrier must inform the affected customers of the content of the tariff publication. Such notification should be made in a form appropriate to the circumstance and may include written notification, personal contact, or advertising in newspapers of general circulation.

[old § 61.58(e) deleted]

§ 61.58 Notice requirements.

Every tariff publication or filing shall bear an effective date and, except as otherwise provided by regulation, special permission, or order of the Commission, shall give at least the number of days notice to the public and to the Commission specified hereinafter. If a new or revised tariff provision fits into more than one of the categories listed below, the longest period of public notice provided for shall apply. Notice shall be given by filing with the Commission such proposed tariff publications. In addition to this notice, if the tariff publication proposes to increase any charge or to effectuate an authorized discontinuance, reduction or other impairment of service to any customer, the filing carrier shall take such steps as are appropriate under the circumstances to inform the affected customers of the content of the tariff publication. Any period of notice required herein shall begin on and shall include the date the tariff is received by the Commission, but shall not include the effective date. In computing the notice required. Sundays and holidays shall be counted.

§ 61.58 Notice requirements.

(e) if no petitions seeking suspension or rejection of a new tariff filing are received within the periods of public notice fixed in § 1.773(a)(2), the filings carrier may apply for Special

Permission pursuant to §§ 61.151, 61.152, and 61.153 of the Commission's rules to refile the relevant tariff pages to become effective before the full notice period has elapsed.

(b) *Non-Dominant Carriers.*
Tariff filings of non-dominant carriers must be made on at least 14 days' notice.

(c) *Other Carriers.*

(1) Tariff filings in the instances specified in (i), (ii) and (iii) below must be made on at least 15 days' notice.

(i) Tariffs filed in the first instance by new carriers.

§ 61.58 Notice requirements.

(f) Tariff filings of carriers found by the Commission to be non-dominant may be filed on 14-day's notice to the public, notwithstanding the requirements of paragraphs (b) and (c) of this section.

§ 61.60 Tariffs filed in first instance by wire carriers.

Carriers which have not previously established any charges or regulations may establish charges and regulations for wire service in the first instance upon not less than 15 day's notice to the Commission and the public.

(ii) Tariff filings involving new rates and regulations not previously filed at, from, to or via points on new lines; at, from, to or via new radio facilities; or for new points of radio communication.

§ 61.61 Charges and regulations for service on new lines.

Charges and regulations applicable at, from, to, or via points on new lines for which the Commission has issued a certificate of public convenience and necessity may be established on not less than 15 day's notice: *Provided*, That no charges or regulations so applicable have previously been filed and that every schedule containing such charges and regulations shall bear a notation showing the date and number of the certificate.

§ 61.62 Charges and regulations for service via new radio stations.

(a) Charges and regulations applicable at, from, to, or via new radiotelephone or radiotelegraph stations for which the Commission has issued a construction permit may be established on not less than 15 day's notice: *Provided*, That no charges or regulations so applicable have previously been filed and that every schedule containing such charges and regulations shall bear a notation showing the date of the notification to the Commission when the public service tests will begin, if public service is to be rendered prior to issuance of a license, or a notation showing the date and number of the license, if public service is not to be rendered until after issuance of a license.

(b) Charges and regulations applicable at, from, to, or via new radiotelephone or radiotelegraph stations for which the Commission does not require a construction permit but for which the Commission has issued a license may be established on not less than 15 day's notice: *Provided*, That no charges or regulations so applicable have previously been filed and that every schedule containing such charges and regulations shall bear a notation showing the date and number of the license.

§ 61.63 Charges and regulations for service via new points by radio.

Charges and regulations applicable at, from, to, or via new points of communication by radiotelephone or radiotelegraph stations, for which new points the Commission has issued a license or modification of license, may be established on not less than 15 day's notice: *Provided*, That no charges or regulations so applicable have previously been filed and that schedules containing such charges and regulations shall bear a notation showing the date and number of the license or modification of license: *And provided further*, That this section shall not apply to new points of communication which are not named either generally or specifically in the license or modification of license.

(iii) Tariff filings involving a change in the name of a carrier, a change in Vertical and Horizontal coordinates (or other means used to determine airline mileages), a change in the lists of mileages, a change in the lists of connecting, concurring or other participating carriers, text changes, or the imposition of termination charges calculated from effective tariff provisions. The imposition of termination charges does not include the initial filing of termination liability provisions.

(2) Tariff filings involving a change in rate structure, a new service offering, or a rate increase must give at least 45 days' notice.

(3) All tariff filings not specifically assigned a different period of public notice in this part must give at least 35 days' notice.

§ 61.21 Categories of tariff filings.

(a) The term "change in V&H coordinates" means a change in the vertical and horizontal coordinates or the like used in determining airline miles as well as any change in lists of mileages calculated therefrom.

(d) The term "imposition of termination charges" means the filing of termination charges calculated from previously effective tariff provisions.

§ 61.58 Notice requirements.

(a) Tariff filings involving a change in the name of a carrier, a change in V&H coordinates, corrections, a change in the lists of connecting, concurring or other participating carriers, text changes or the imposition of termination charges shall give not less than 15 day's notice to the public and to the Commission.

§ 61.58 Notice requirements.

(b) Tariff filings involving a change in rate structure, a new service offering, or a rate increase shall give at least 90 day's notice to the public and to the Commission.

§ 61.58 Notice requirements.

(c) All tariff filings not specifically assigned a different period of public notice in this part shall give at least 70 day's notice to the public and to the Commission.

§ 61.59 Effective period required before changes.

EXPLANATION

States former § 61.59(a) without change; adds exception for corrections.

PROPOSED RULE

§ 61.59 Effective period required before changes. Except as provided in Section 61.58(a)(3), or except as otherwise authorized by the Commission, new rates or regulations must be effective for at least 30 days before any change may be made.

§ 61.60 Deleted.

EXPLANATION

Consolidated in proposed § 61.58.

§ 61.61 Deleted.

EXPLANATION

Consolidated in proposed § 61.58.

§ 61.62 Deleted.

EXPLANATION

Consolidated in proposed § 61.58.

§ 61.63 Deleted.

EXPLANATION

Consolidated in proposed § 61.58.

§ 61.59 Tariffs and supplements must become effective; exceptions.

(a) Except as provided in this section, or except as otherwise specially authorized by the Commission, after notice of a change has been published and filed, the new charges or regulations must be allowed to become effective and remain so for at least 30 days from their effective date before any change can be made therein.

§ 61.64 Rates and regulations for ticker service.

EXPLANATION

No change.

PROPOSED RULE

§ 61.64 Rates and regulations for ticker service. Rates and regulations for individual installations of market and stock quotation and baseball ticker service may be established on not less than 15 days' notice to the public and to the Commission, when there are no rates and regulations in effect for such service at the points where installations are to be made.

§ 61.66 Changes in message telegraph service point listings where basic schedules of rates and regulations are already effective.

EXPLANATION

No change other than deletion of (c) because no longer a tariffed service.

PROPOSED RULE

§ 61.66 Changes in message telegraph service point listings where basic schedules of rates and regulations are already effective.

(a) When an effective message telegraph service point listing specifies by dates (1) that communication service is available to or from a service point during sporting events, military maneuvers, shipping or resort seasons, or (2) that an office or agent of a carrier is located at such service point for the receipt or delivery of communications during those specified periods, changes in the dates may be filed on not less that 15 days' notice.

§ 61.64 Charges and regulations for ticker service.

Charges and regulations for individual installations of market and stock quotation and baseball ticker service may be established on not less than 15 day's notice to the Commission and to the public, when there are no charges and regulations in effect for such service of the points where installations are to be made.

§ 61.66 Changes in message telegraph and money order service point listings.

(a) When a message telegraph service point or money order service point listing that is already on file and in effect specifies by dates (1) that communication service is available to or from a service point during sporting events, military maneuvers, shipping or resort seasons, or (2) that an office or agent of a carrier is located at such service point for the receipt or delivery of communications during the aforementioned periods, changes in the dates may be published and filed on not less than 15 day's notice.

(b) A message telegraph service point listing that is already on file and in effect may be changed on not less than 15 day's notice to show (1) that such point is changed from a point at which there is neither an office nor an agent of a telegraph company for the receipt or delivery of telegrams to a point at which there is such an office or agent, or (2) that such point is changed from a point at which there is an agent of a telegraph company to receive or deliver messages to a point at which there is a telegraph company office: *Provided*, That the basic schedules of charges and regulations applicable to such message telegraph service are already on file and in effect.

(b) An effective message telegraph service point listing may be changed on not less than 15 days' notice to show (1) that a point at which there is neither an office nor an agent of a telegraph company for the receipt or delivery of telegrams has been changed to a point at which there is such an office or agent, or (2) that a point at which there is an agent of a telegraph company to receive or deliver messages has been changed to a point at which there is a telegraph company office.

(c) A message telegraph service point listing may be changed on not less than 15 days' notice to reflect a discontinuance, reduction or impairment of service in accordance with a certificate or authorization granted by the Commission, if the total charges to the customer for service are not increased. Every schedule containing such changes must bear a notation showing the date and number of the certificate or authorization.

[old § 61.66(c) deleted because no longer a tariffed service]

§ 61.66 Changes in message telegraph and money order service point listings.

(d) A message telegraph service point or money order service point listing may be changed on not less than 15 day's notice to reflect a discontinuance, reduction or impairment of service to accordance with a certificate or authorization granted by the Commission: *Provided*, That the total charges to the customer for service are not increased and that every schedule containing such changes shall bear a notation showing the date and number of the certificate or authorization.

§ 61.66 Changes in message telegraph and money order service point listings.

(c) A money order service point listing that is already on file and in effect may be changed on not less than 15 day's notice to show (1) that such point is changed from a point at which there are no local facilities for handling money orders to a point at which money orders are paid or accepted, (2) that such point is changed from a point at which money orders are paid only, to a point at which money orders are paid and accepted, or (3) that such point is changed from a point at which money orders are paid and accepted by an agent of the telegraph company to a point at which money orders are paid and accepted by a telegraph company office: *Provided*, That the basic schedules of charges and regulations applicable to such money order service are already on file and in effect.

§ 61.67 New or discontinued telephone, telegraph, teletypewriter service points; mileages.

EXPLANATION

Adds "teletypewriter" to state rule coverage in more general terms and deletes "money order" because no longer a tariffed service.

PROPOSED RULE

§ 61.67 New or discontinued telephone, telegraph, teletypewriter service points; mileages. Message toll telephone service points and teletypewriter exchange service points added or discontinued during a calendar month, and message telegraph service points added during a calendar month, may be filed not later than 20 days after the end of such month where the basic schedules of rates and regulations applicable to such message toll telephone, teletypewriter exchange, and message telegraph are effective and the effective date of each addition or discontinuance is shown.

§ 61.67 New or discontinued telephone, telegraph, money order and TWX service points; mileages.

Message toll telephone service points and teletypewriter exchange service points added or discontinued during a calendar month, and message telegraph service points (including new message telegraph service points published and filed under authority of § 61.59), money order service points, and mileages for private line services added during a calendar month, may be filed not later than 20 days after the end of such month: *Provided*, That the basic schedules of charges and regulations applicable to such message toll telephone, teletypewriter exchange, message telegraph, money order and private line services are already on file and in effect: *And provided further*, That the effective date of each addition or discontinuance is shown.

§ 61.68 Special notation.

EXPLANATION

Consolidates scattered references to special notation formerly contained in portions of §§ 61.54, 61.68, and 61.70.

PROPOSED RULE

§ 61.68 Special Notation.

(a) A tariff filing must contain a statement of the authority for any matter to be filed on less than the notice required in Section 61.58. The following format must be used: "Issued on not less than ____ days' notice under authority of ____ (specific reference to the special permission, decision, order or section of these rules)." If all the matter in a tariff publication is to become effective on less than the notice required in Section 61.58, specific reference to the Commission authority must be shown on the title page. If only a part of the tariff publication is to become effective on less than the notice required in Section 61.58, reference to the Commission authority must appear on the same page(s), and be associated with the pertinent matter.

(b) When a portion of any tariff publication is issued in order to comply with a Commission order, the following notation must be associated with that portion of the tariff publication: "In compliance with the order of the Federal Communications Commission in ____ (a specific citation to the applicable order should be made)."

§ 61.54 Title page, contents and arrangements.

(d) *Special notations.* (1) A notation that the tariff or supplement is "Issued on not less than __ days' notice under authority of ___ (here give specific reference to special permission, decision, order or rule)," provided authority to publish all of the charges and regulations contained in the tariff or supplement on less than 30 days' notice has been granted by the Commission.

(2) When an entire tariff or supplement is issued in compliance with a decision or order, and regardless of whether it is made effective on statutory notice or on less than statutory

notice under special authority granted in the decision or order, such tariff or supplement shall bear on its title page the notation "In compliance with decision (or order) of Federal Communications Commission in Docket No. __ (Whenever possible, the volume and page number of the report of the Federal Communications Commission should be cited)."

§ 61.68 Authority for less than statutory notice to be shown.

A tariff or supplement shall indicate the authority for any matter therein which is to be established on less than statutory notice by a notation in the following form: "Issued on not less than ____ days' notice under authority of ______ (here give specific reference to the special permission, decision, order or section)." If all the matter in a tariff or supplement is to become effective on less than statutory notice, the regulation, special permission, or order of the Commission authorizing less than statutory notice shall be shown on the title page. If only a part of the tariff or supplement is to become effective on less than statutory notice, reference to the regulation, special permission or order of the Commission authorizing less than statutory notice shall be shown on the same page and directly in connection with the matter so published.

§ 61.79 Special notations.

When a portion of a tariff or supplement is issued in compliance with a decision or order, and regardless of whether it is made effective on statutory notice or on less than statutory notice under special authority granted in the decision or order, the following notation shall be shown in connection with such portion of such tariff or supplement: "In compliance with decision (or order) of Federal Communications Commission in Docket No. __. (Whenever possible, the volume and page number of the report of the Federal Communications Commission should be cited.)"

§ 61.69 Rejection.

EXPLANATION

Consolidates provisions concerning rejection formerly found in §§ 61.69(a) and 61.117. Former § 61.69(b) has been deleted as duplicative of former § 61.69(c), which is now found in proposed § 61.1(b).

PROPOSED RULE

§ 61.69 Rejection.

When a tariff publication is rejected by the Commission, its number may not be used again. The rejected tariff publication may not be referred to as cancelled or revised. The publication that is subsequently issued in lieu of the rejected tariff publication must bear the notation "In lieu of ____, rejected by the Federal Communications Commission."

§ 61.69 Rejections.

(a) When a tariff or supplement is rejected by the Commission, the number which it bears shall not be again used. Such tariff or supplement shall not thereafter be referred to as cancelled, amended, or otherwise, but the publication that is issued in lieu of such rejected tariff or supplement shall bear notation "In lieu of ____________ rejected by Commission."

§ 61.117 Rejected pages.

When a page of a tariff is rejected by the Commission, the number which it bears shall not be again used. Such page shall not thereafter be referred to as cancelled, amended, or otherwise, but the revised page that is issued in lieu of such rejected page shall bear the notation "In lieu of ________, rejected by the Commission."
(number of page)

§ 61.70 Deleted.

EXPLANATION

Consolidated into proposed § 61.68.

§ 61.71 Reissued matter.

EXPLANATION

No change.

PROPOSED RULE

§ 61.71 Reissued matter.

Matter in effect for less than 30 days and brought forward without change from another tariff publication must bear the appropriate symbol provided in Section 61.54(i)(1) for reissued matter. The number and original effective date of the tariff publication in which the matter was originally published must be associated with the reissued matter.

§ 61.71 Reissued matter.

Matter which has not been in effect for 30 days and is brought forward without change from another tariff, also matter brought forward without change from one supplement to another, shall bear the appropriate symbol provided in § 61.55 (e) for reissued matter; and in connection with such reissued matter the number and original effective date of the tariff or supplement in which the matter was originally published shall be shown, unless such matter was originally made effective on a date other than the general effective date shown on the title page of the tariff or supplement in which it was originally published in which event the original effective date of such matter shall be shown.

§ 61.72 Posting.

EXPLANATION

Incorporates the definition of posting formerly found in § 61.17 within new § 61.72(a), and alters present § 61.72 only by adding provisions which reflect the different time periods governing non-dominant carriers. Posting is also now explicitly required in territories as well as states.

PROPOSED RULE

§ 61.72 Posting.

(a) Offering carriers must post (i.e., keep accessible to the public) during the carrier's regular business hours, a schedule of rates and regulations. This schedule must include all effective and proposed rates and regulations pertaining to the services offered to and from the community or communities served, and must be the same as that on file with the Commission. This posting requirement may be satisfied by either of the following methods:

(1) First Method. Where the filing carrier has an office or offices open to the public in communities or territories of the United States, the carrier must post the schedule of rates and regulations in the main office.

(2) Second Method. The schedule of rates and regulations must be posted in each state or territory of the United States in which the carrier operates, as follows:

(i) in the main office of the filing carrier open to the public in every city with a population of 100,000 or more in that state or territory (or in the largest community served if none has a population of 100,000); and

§ 61.17 Posted.

The term "posted," whenever used in this part, means kept in a convenient place accessible to the public for public inspection.

§ 61.72 Posting.

Filing carriers are required to post a schedule of rates and regulations to be available for public inspection during regular business hours. This schedule shall include all effective and proposed rates and regulations pertaining to the services offered to and from the community or communities served and shall be the same as that on file with the Commission. This posting requirement may be satisfied by either of the following methods:

(a) *First Method*. The schedule of rates and regulations shall be posted in every community within the United States in which the filing carrier has an office open to the public in such office (in the main office in the case of a filing carrier with more than one office in a single community).

(b) *Second Method*. The schedule of rates and regulations shall be posted in each state in which the carrier operates as follows:

(1) In the main office of the filing carrier open to the public in every city with a population of 100,000 or more in that state (or in the largest community served if none has a population of 100,000); and

(2) In the main office of the carrier in the state capital.

If a carrier chooses the second method, a notice must be posted in each and every business office of the carrier open to the public in that state indicating the street address of the nearest location in which the schedule of rates and regulations can be found.

The posting of rates and regulations shall be deemed timely if the rates or regulations are available for public inspection at the posting locations within 15 days of their filing with the Commission. The carrier shall clearly indicate which rates and regulations are currently effective and which are proposed to be put into effect in the future.

(ii) in the main office of the carrier in the state or territorial capital.

If a carrier chooses this method, it must post a notice in each business office of the carrier open to the public in that state or territory, stating the street address of the nearest location in which the schedule of rates and regulations can be found.

(b) The posting of rates and regulations shall be considered timely if they are available for public inspection at the posting locations within 15 days of their filing with the Commission.

§ 61.73 Duplication of rates or regulations.

EXPLANATION

No change.

PROPOSED RULE

§ 61.73 Duplication of rates or regulations.

A carrier concurring in schedules of another carrier must not publish conflicting or duplicative rates or regulations.

§ 61.73 Duplication of charges or regulations.

A carrier that has filed a concurrence in schedules of another carrier shall not in its own issues publish charges or regulations which duplicate or conflict with those which are published by such other carrier.

§ 61.74 References to other instruments.

EXPLANATION

No change.

PROPOSED RULE

§ 61.74 References to other instruments.

(a) Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument.

(b) Tariffs for end-to-end through services may reference the tariffs of other carriers participating in the offering.

(c) Tariffs may reference concurrences for the purpose of stating where rates or regulations applicable to a service not governed by the tariff may be found.

§ 61.74 References to other instruments.

(a) Except as otherwise provided in this and other sections of this part, no tariff publication filed with the Commission may make reference to any other tariff publication or to any other document or instrument.

(b) A tariff containing certain matter applicable to a particular service may refer to another tariff for other matter applicable to such service if the reference is made in behalf of a carrier which is a party to each tariff: *Provided, however*, That such reference does not result in undue complication.

(c) This section shall not prohibit a reference to a concurrence solely for the purpose of indicating where charges or regulations applicable to a service not governed by the tariff may be found. (48 Stat. 1068)

§ 61.91 Deleted.

EXPLANATION

Consolidated into proposed § 61.1(b).

§ 61.92 Deleted.

EXPLANATION

Consolidated into proposed § 61.52(b).

§ 61.93 Deleted.

EXPLANATION

Archaic.

§ 61.94 Deleted.

EXPLANATION

Consolidated into proposed § 61.54(i)(2).

§ 61.95 Deleted.

EXPLANATION

Archaic.

§ 61.96 Deleted.

EXPLANATION

Archaic.

§ 61.111 Deleted.

EXPLANATION

Consolidated into proposed § 61.1(b).

§ 61.93 Amendments.

A change in, or addition to, a tariff shall be known as an amendment, and, excepting amendments to tariffs of less than five pages, shall be published in a supplement to the tariff. Tariffs of less than five pages shall be amended by a new tariff which shall cancel the tariff to be amended. When an amendment is made in an item or rule, such item or rule shall be published in a supplement in its entirety as amended.

§ 61.95 Number of supplements permitted.

Tariffs of four pages or less shall have no supplement; and, except as provided herein, the number of supplements permitted to tariffs of five pages or more shall be as follows:

Size of tariffs:	*Number of Supplements*
5, but not more than 16 pages	1
17, but not more than 80 pages	2
31, but not more than 200 pages	3
Over 200 pages	4

Ten supplements, in addition to those above authorized, may be in effect at any one time in which charges or regulations are published on not less than 1 day's notice under authority of § 61.64. A suspension, adoption or cancelling supplement may be filed without regard to the provisions of this section.

§ 61.96 Volume of supplemental matter permitted.

Tariffs containing 12 pages or less shall not have more than 4 pages of supplemental matter; and tariffs containing more than 12 pages shall not have supplemental matter aggregating more than 331/3 percent of the number of pages of the tariff. A suspension, adoption, or cancelling supplement may be filed without regard to the provisions of this section.

§ 61.112 Deleted.

EXPLANATION

Consolidated into proposed § 61.52(b).

§ 61.113 Deleted.

EXPLANATION

Consolidated into proposed § 61.54(c).

§ 61.114 Deleted.

EXPLANATION

Consolidated into proposed § 61.54(c).

§ 61.115 Deleted.

EXPLANATION

Consolidated into proposed § 61.54(c).

§ 61.116 Deleted.

EXPLANATION

Consolidated into proposed § 61.56.

§ 61.117 Deleted.

EXPLANATION

Consolidated into proposed § 61.69.

§ 61.118 Deleted.

EXPLANATION

Consolidated into proposed § 61.54(i).

§ 61.119 Deleted.

EXPLANATION

Consolidated into proposed § 61.54(b).

CONCURRENCES

§ 61.131 Scope.

EXPLANATION

This sub-part has been entirely restructured. This section describes its general scope and delineates the two broad categories of concurrence.

PROPOSED RULE

§ 61.131 Scope.

Sections 61.132 through 61.137 apply to a carrier which must file concurrences reflecting rates and regulations for through service provided in conjunction with other carriers and to a carrier which has chosen, as an alternative to publishing its own tariff, to arrange concurrence in an effective tariff of another carrier. Limited or partial concurrences will not be permitted.

§ 61.132 Method of filing concurrences.

EXPLANATION

Consolidates present §§ 61.133, 61.135, and 61.137.

PROPOSED RULE

§ 61.132 Method of filing concurrences.

A carrier proposing to concur in another carrier's effective tariff must deliver two copies of the concurrence to the issuing carrier in whose favor the concurrence is issued. The concurrence must be signed by an officer or agent of the carrier executing the concurrence, and must be numbered consecutively in a separate series from its FCC tariff numbers. At the same time the issuing carrier revises its tariff to reflect such a concurrence, it must submit both copies of the concurrence to the Commission. The concurrence must bear the same effective date as the date of the tariff filing reflecting the concurrence.

§ 61.133 Tariffs and concurrences must be filed before service may be rendered.

No carrier whatsoever may engage or participate in any interstate or foreign communication service between any points unless and until every tariff publication of every carrier containing all charges and regulations for itself and its connecting carriers, and the concurrence of every concurring carrier, for such communication service is on file with the Commission and in effect except as provided in § 61.138.

§ 61.135 Concurrences in new or revised tariff publications.

Whenever an issuing carrier publishes and files a new or revised tariff, supplement or looseleaf page purporting to establish charges or regulations applicable to service for which any concurrence is required under the provisions of § 61.131 or § 61.132, and for which no such concurrence has already been properly filed with the Commission, every such issuing carrier shall obtain from every concurring carrier all required concurrences and shall submit two copies of every such concurrence to the Commission at the same time the new or revised tariff, supplement or loose-leaf page is filed. Every such concurrence shall bear an effective date which shall be the same as the effective date of the charges or regulations in which the concurrence is made.

§ 61.137 Construction, filing.

Every instrument of concurrence and notice of revocation thereof shall be prepared and plainly printed on hard-calendered No. 1 machine-finished book or 20-pound bond paper of durable quality and of size 81/2 by 11 inches. Stereotype, planograph, mimeograph or other process equally durable may be used, provided that all copies are clear and legible in all respects. Reproductions by hectograph, typewriter or similar process shall not be used. Copies shall be delivered to the issuing carrier in whose favor such concurrence or notice is issued and two copies shall be filed with the Commission as provided in § 61.135. Every copy filed with the Commission shall be signed by the person, persons, or officer executing the concurrence or notice. Every carrier shall number its concurrences consecutively from No. 1, keeping such numbers in a series separate and distinct from FCC numbers of tariffs. Except as otherwise provided in §§ 61.134 and 61.135, a concurrence shall bear no effective date but shall be effective on and from the date it is filed with the Commission.

§ 61.133 Format of concurrence.

EXPLANATION

Formerly found at § 61.136.

PROPOSED RULE

§ 61.133 Format of concurrence.

(a) Concurrences must be issued in the following format:

CONCURRENCE

F.C.C. Concurrence No. ____
(Cancels F.C.C. Concurrence No. ____)
(Name of Carrier ________)
(Post Office Address ________)
________, 19____
(Date)

Secretary,

Federal Communications Commission
Washington D.C. 20554

This is to report that ______________________ assents to and concurs in the
(name of concurring carrier)
tariff described below.

______________________ thus makes itself a party to these tariffs and
(name of concurring carrier)
obligates itself (and its connecting carriers) to observe every provision in them, until a notice of revocation is filed with the Commission and delivered to the issuing carrier.

This concurrence applies to interstate (and foreign) communication:

1. Between the different points on the concurring carrier's own system;
2. Between all points on the concurring carrier's system and the systems of its connecting carriers; and
3. Between all points on the system of the concurring carrier and the systems of its connecting carriers on the one hand, and, on the other hand, all points on the system of the carrier issuing the tariff or tariffs listed below and the systems of its connecting carriers and other carriers with which through routes have been established.

(NOTE: Any of the above numbered paragraphs may be omitted or the wording modified to state the points to which the concurrence applies.)

§ 61.136 Form of concurrence.

(a) Whenever a carrier desires to concur in a tariff or tariffs issued and filed by another carrier, a concurrence, in the following form, shall be issued in favor of such other carrier:

Concurrence

F.C.C. Concurrence No.
(Cancels F.C.C. Concurrence No. __________)
(Name of Carrier ____________________)
(Post Office Address ______________)
______________, 19________
(Date)

To the Federal Communications Commission, Washington, D.C.

This is to report that the ____
(name of carrier)
hereinafter called the concurring carrier, assents to, adopts, and concurs in the tariffs described below, and hereby makes itself a party thereto and hereby obligates itself (and its connecting carriers) to observe each and every provision therein until this authority is revoked by formal and official notice of revocation filed with the Federal Communications Commission and delivered to the issuing carrier.

This concurrence applies to interstate (and foreign) wire (and radio) communication:

1. Between the different points on the concurring carrier's own system:

2. Between all points on the concurring carrier's own system and the systems of its connecting carriers, as defined in Section 3(u) of the Communications Act of 1934; and

3. Between all points on the system of the concurring carrier and the systems of its connecting carriers on the one hand, and all points on the system of the carrier issuing the

tariff or tariffs listed below and the systems of its connecting carriers and other carriers with which through routes have been established on the other hand.

(NOTE: Any of the above numbered paragraphs may be omitted or the wording thereof may be modified to indicate definitely the points to or from which the concurrence applies.)

TARIFF

(Here give the exact description of tariff or tariffs concurred in by carrier, F.C.C. number, title, date of issue, and date effective. Example: A.B.C. Communications Company, F.C.C. No. 1, Interstate Telegraph Message Service, Issued January 1, 1939, Effective January 31, 1939.)

Cancels F.C.C. Concurrence No. __________, effective ______, 19____.

____
(Name of Concurring Carrier)
By ____________________
____
(Title)

TARIFF

(Here describe the tariff or tariffs concurred in by the carrier, specifying FCC number, title, date of issuance, and date effective. Example: A.B.C. Communications Company, Tariff FCC No. 1, Interstate Telegraph Message Service, Issued January 1, 1983, Effective April 1, 1983).

Cancels F.C.C. Concurrence No. __________, effective ______, 19____.

____
(Name of Concurring Carrier)
By ____________________
____
(Title)

(b) No material is to be included in a concurrence other than that indicated in the above-prescribed form, unless specially authorized by the Commission. A concurrence in any tariff so described will be deemed to include all amendments and successive issues which the issuing carrier may make and file. All such amendments and successive issues will be binding between customers and carriers. Between carriers themselves, however, the filing by the issuing carrier of an amendment or successive issue with the Commission must not imply or be construed to imply an agreement to the filing by concurring carriers. Such filings do not affect the contractual rights or remedies of any concurring carrier(s) which have not, by contract or otherwise, specifically consented in advance to such amendment or successive issue.

§ 61.136 Form of concurrence.

(b) No material shall be included in a concurrence other than that indicated in the above-prescribed form unless otherwise specially authorized by the Commission. A concurrence in any tariff described therein shall be deemed to include all amendments and successive issues thereof which the issuing carrier named therein may make and file, and all such amendments and successive issues so filed shall be binding between the public and the carriers; but as between the carriers themselves, the filing by the issuing carrier of any such amendment or successive issue with the Federal Communications Commission shall not imply or be construed to imply an agreement thereto by, nor shall such filing affect the contractual rights or remedies of, any concurring carrier which has not by contract or otherwise specifically consented in advance to such amendment or successive issue.

§ 61.134 Concurrences for through services.

EXPLANATION

Consolidates present §§ 61.131, 61.132. The approach of the existing Sections, which separately specify requirements for concurrences which contain all schedules and those which contain a portion of some schedules, was considered unnecessarily confusing.

PROPOSED RULE

§ 61.134 Concurrences for through services.

A carrier filing rates or regulations for through services between points on its own system and points on another carrier's system (or systems), or between points on another carrier's system (or systems), must list all concurring, connecting, or other participating carriers as provided in Sections 61.54(f), (g) and (h). Except as provided in Section 61.137, a concurring carrier must tender a properly executed instrument of concurrence to the issuing carrier. If rates and regulations of the other carriers engaging in the through service(s) are not specified in the issuing carrier's tariff, that tariff must state where the other carrier's rates and regulations can be found. Such reference(s) must contain the FCC number(s) of the referenced tariff publication(s), the exact name(s) of the carrier(s) issuing such tariff publication(s), and must clearly state how the rates and regulations in the separate publications apply.

SPECIAL RULES APPLICABLE TO THROUGH SERVICE

§ 61.131 Schedules containing all charges or regulations.

Every issuing carrier publishing charges or regulations for all carriers applicable to communication service between points on its own system and points on the system of any other carrier or carriers, or between points on the system of any other carrier or carriers, shall show, as provided in § 61.55(b) and (c), either as a concurring or as a connecting carrier, as the case may be, every carrier which is subject to any provisions of the act and which participates or engages in such communication service, irrespective of whether it be a terminal or intermediate carrier; and except as provided in § 61.138, authority by means of a properly executed instrument of concurrence shall be given to the issuing carrier by every concurring carrier.

§ 61.132 Schedules containing a portion of through charges or regulations.

Every issuing carrier publishing charges or regulations for one or more but not for all carriers applicable to communication service between points on its own system and points on the system of any other carrier or carriers, or between points on the system of any other carrier or carriers, shall show, as provided in § 61.55 (b), (c), and (d), respectively, every concurring carrier, every connecting carrier, and every other carrier, subject to the act, engaging or participating in such communication service, irrespective of whether such carrier be a terminal or intermediate carrier; and except as provided in § 61.138, authority by means of a properly executed instrument of concurrence shall be given to the issuing carrier by every concurring carrier for which charges or regulations are published. Such issuing carrier shall specifically show by appropriate reference in the tariff published by it where the charges and regulations of every carrier, subject to the act, for which charges and regulations are not published by the issuing carrier will be found. Such reference shall contain the FCC number or numbers of the tariff publication or publications, where the charges and regulations will be found and the exact name or names of the carrier or carriers issuing such tariff publication or publications, and such other information shall be published in connection with such reference as may be necessary to show accurately and definitely how the charges and regulations in the separate publications are to be applied.

§ 61.135 Concurrences for other purposes.

EXPLANATION

This new section requires that concurrences not involving through services be set out in the issuing carrier's tariff.

PROPOSED RULE

§ 61.135 Concurrences for other purposes.
When an issuing carrier permits another carrier to concur in its tariff, the issuing carrier's tariff must state the concurring carrier's rates and points of service.

§ 61.136 Revocation of concurrences.

EXPLANATION

Formerly found at § 61.134. The effective date requirement has been extended to 90 days to conform to the statutory amendment enacted since the last revision of § 61.136.

PROPOSED RULE

§ 61.136 Revocation of concurrences.
A concurrence may be revoked by a revocation notice or cancelled by a new concurrence. A revocation notice or a new concurrence, if less broad in scope than the concurrence it cancels, must bear an effective date not less than 90 days after its receipt by the Commission. A revocation notice is not given a serial number, but must specify the number of the concurrence to be revoked and the name of the carrier in whose favor the concurrence was issued. It must be in the following format:

REVOCATION NOTICE

____
(Name of carrier)

____
(Post office address)

____________, 19___
(Date)

Secretary,
Federal Communications Commission
Washington, D.C. 20554

Effective __________, 19___, FCC Concurrence No. __________
issued by ____________________________
(Name of concurring carrier)
in favor of ____________________________
(Name of issuing carrier)
is hereby cancelled and revoked. Rates and regulations of __________
(Name of concurring carrier)
and its connecting carriers will thereafter be found in Tariff FCC No. __________
issued by __________. (If the concurring carrier has ceased operations, the revocation notice must so indicate.)

____
(Name of carrier)

By ______________________
(Title)

§ 61.134 Revocation of concurrences.

A concurrence may be revoked by revocation notice or cancelled by a new concurrence. A revocation notice, or a new concurrence if less broad in scope than the concurrence it cancels, must bear an effective date, which must be not less than 60 days after its receipt by the Commission for filing. A revocation notice shall not be given a serial number, but shall specify the number of the concurrence to be revoked and the name of the carrier in whose favor the concurrence was issued. It shall be in the following form:

Revocation Notice

____
(Name of carrier)

____
(Post-office address)

______________________, 19__
(Date)

To the Federal Communications Commissions, Washington, D.C.

Effective __________, 19__, F.C.C. Concurrence No. ________, issued by ______________________
(Name of concurring carrier)
in favor of ______________________
(Name of issuing carrier)
is hereby cancelled and revoked. Charges and regulations of ______________________
(Name of concurring carrier)
and its connecting carriers will thereafter be found in Tariff F.C.C. No. __________ issued by __________ (If the concurring carrier has ceased operations the revocation notice shall so indicate).

____
(Name of carrier)

By ______________________
(Title)

§ 61.137 Alaskan carriers and licensees of mobile radio stations.

EXPLANATION

Formerly found in § 61.138.

PROPOSED RULE

§ 61.137 Alaskan carriers and licensees of mobile radio stations.

Any carrier operating by wire or radio in Alaska, and any Commission licensee of a mobile radio station operating as a common carrier which participates in service with a carrier that has on file with the Commission a tariff containing the rates and regulations of the Alaskan carrier, or of the mobile radio licensee, need not file a written concurrence. However, any such Alaskan wire or radio carrier, or mobile radio station licensee, which has not filed either a written concurrence or an effective tariff in its own name, will be considered to have assented to, adopted and concurred in the tariff applicable to the service on file with the Commission.

§ 61.138 Alaskan carriers and licensees of mobile radio stations.

Any carrier operating by wire or radio in Alaska and any licensee of a mobile radio station operating as a common carrier for hire, participating in service with a carrier that has published and filed with the Commission a tariff or tariffs containing the charges and regulations of such carrier operating in Alaska or of such licensee applicable to such service, will not be required to file a written concurrence in such tariff or tariffs; but any such carrier operating in Alaska or any such licensee so participating in service for which it has not filed a written concurrence or for which it does not have on file with the Commission an effective tariff issued by it and in its own name, shall be deemed, to all intents and purposes, to have assented to, adopted and concurred in the tariff or tariffs applicable to the service filed by the other carrier the same as if it had filed a written concurrence in the manner and form provided in these rules.

APPLICATIONS FOR SPECIAL PERMISSION

§ 61.151 Scope.

EXPLANATION

This sub-part has been entirely restructured. This section describes its general scope.

PROPOSED RULE

§ 61.151 Scope.

Sections 61.152 and 61.153 set forth the procedures to be followed by a carrier applying for a waiver of any of the rules in this part.

§ 61.152 Terms of applications and grants.

EXPLANATION

Proposed § 61.152 consolidates substantive requirements for special permission applications now set out in §§ 61.152 and 61.153.

PROPOSED RULE

§ 61.152 Terms of applications and grants.

Applications for special permission must contain (1) a detailed description of the tariff publication proposed to be put into effect; (2) a statement citing the specific rules and the grounds on which waiver is sought; and (3) a showing of good cause. If approved, the carrier must comply with all terms and use all authority specified in the grant. If a carrier elects not to use or to use less than the authority granted, it must apply to the Commission for cancellation or modification of the original grant.

§ 61.152 Factors considered; terms of permission.

When passing upon applications, the Commission gives consideration to all the facts and circumstances set forth in the application, including a showing of good cause why the tariff filing should be made on the shorter period of public notice proposed by the carrier rather than on the full period of public notice. If approved, the special permission is issued with the understanding that all its terms are to be complied with and that all the authority dealing with the same subject matter will be used. Therefore, if all related matter authorized by special permissions will not be established, and more limited authority is desired, a new application complying with the provisions of this section in all respects and making reference to the previous authority shall be filed.

§ 61.153 Form and contents of application and fee required.

Applications (including amendments thereto and exhibits made a part thereof) for permission to change charges or regulations, on less than statutory notice (for prescribed fee, see Subpart G of Part 1 of this chapter), or for waiver of any of the provisions of the rules in this part, shall be made and filed in duplicate, and addressed to the Federal Communications Commission, Washington, D.C., 20554. Such applications shall be made on paper of size 81/2 by 11 inches, shall be numbered consecutively, and shall bear the signature of the proper officer of the carrier, or a duly authorized attorney or agent, the title of whom shall be specified. Such applications shall give the information required in the following form:

Application No ________
(Type of service) ________
(Place where rendered) ________

____
(Name of carrier)

____
(Place and date)

FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554.

ATTENTION: COMMON CARRIER BUREAU

Gentlemen: Application is hereby made for permission to put in force the following charges or regulations to become effective — days after they are filed with the Federal Communications Commission:

(Here give a full description of the charges or regulations which it is desired to put into effect and statement of points of origin and destination. If permission is sought to establish a rule or regulation, the exact wording of the proposed rule or regulation shall be shown.)

(Here follow with a statement showing good cause why the tariff filing should be made on the shorter period of public notice proposed by the carrier rather than on the full period of public notice.)

(If the application requests waiver of rules, other than those relating to notice, it shall specify by section number the rule to be waived and the reasons therefor.)

____
(Exact name of carrier)

____
(Name of officer)

____
(Title of officer)

§ 61.153 Method of filing applications.

EXPLANATION

Proposed § 61.153 consolidates format requirements and filing procedures now found in §§ 61.151 and 61.153. It also formalizes existing informal practice requiring that an additional copy be filed with the Chief, Tariff Review Branch, and that illustrative tariff pages accompany the application.

PROPOSED RULE

§ 61.153 Method of filing applications.

A carrier applying for special permission must submit two copies of the application (including illustrative tariff pages, associated amendments and exhibits) to the Secretary, Federal Communications Commission, Washing-

ton, D.C. 20554. Simultaneously, and by the same means, a carrier must furnish a separate copy with all attachments to the Chief, Tariff Review Branch. If a carrier applies for special permission to revise joint tariffs, the application must state that it is filed on behalf of all carriers participating in the affected service. Applications must be numbered consecutively in a series separate from the FCC tariff numbers, bear the signature of the officer or agent of the carrier, and be in the following format:

Application No. ______

______
(Date)

Secretary,
Federal Communications Commission
Washington, D.C. 20554

Attention: Common Carrier Bureau

(Here provide the statements required by Section 61.152).

______
(Exact name of carrier)

______
(Name of officer or agent)

______
(Title of officer or agent)

§ 61.151 Application for permission; who may make.

Applications for permission to establish charges or regulations, on less than statutory notice, or for waiver of any of the provisions of the rules in this part, shall be made by the carrier that has authority to file the proposed change. If a request is made in an application for permission to make changes in joint tariffs, the application must contain the statement that the application is filed for and on behalf of all carriers parties to the proposed changes.

§ 61.153 Form and contents of application and fee required.

Applications (including amendments thereto and exhibits made a part thereof) for permission to change charges or regulations, on less than statutory notice (for prescribed fee, see Subpart G of Part 1 of this chapter), or for waiver of any of the provisions of the rules in this part, shall be made and filed in duplicate, and addressed to the Federal Communications Commission, Washington, D.C., 20554. Such applications shall be made on paper of size 81/2 by 11 inches, shall be numbered consecutively, and shall bear the signature of the proper officer of the carrier, or a duly authorized attorney or agent, the title of whom shall be specified. Such applications shall give the information required in the following form:

Application No ______
(Type of service) ______
(Place where rendered) ______

______
(Name of carrier)

______
(Place and date)

FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554.

ATTENTION: COMMON CARRIER BUREAU

Gentlemen: Application is hereby made for permission to put in force the following charges or regulations to become effective — days after they are filed with the Federal Communications Commission:

(Here give a full description of the charges or regulations which it is desired to put into effect and statement of points of origin and destination. If permission is sought to establish a rule or regulation, the exact wording of the proposed rule or regulation shall be shown.)

(Here follow with a statement showing good cause why the tariff filing should be made on the shorter period of public notice proposed by the carrier rather than on the full period of public notice.)

(If the application requests waiver of rules, other than those relating to notice, it shall specify by section number the rule to be waived and the reasons therefor.)

____
(Exact name of carrier)

____
(Name of officer)

____
(Title of officer)

ADOPTION OF TARIFFS AND OTHER DOCUMENTS OF PREDECESSOR CARRIERS

§ 61.171 Adoption notice.

EXPLANATION

Deletes requirement of former §§ 61.172–61.173 that an adoption supplement be filed, which was duplicative of the adoption notice requirement. More importantly, proposed § 61.171 substantially alters the procedure for adoption of tariffs by successor carriers. Former practice allowed existing tariff pages to be maintained, creating customer confusion when the offering carrier's name had changed, and similar administrative difficulty for staff. Proposed § 61.171 requires reissuance of the tariff in the name of the adopting carrier, but provides two alternative methods for adoption to suit the convenience of the adopting carrier.

PROPOSED RULE

§ 61.171 Adoption notice.

When a carrier's name is changed, or its operating control transferred from one carrier to another in whole or in part, the successor carrier must file tariff revisions to reflect the name change. The successor carrier may either immediately reissue the entire tariff in its own name, or immediately file an adoption notice. Within 15 days of filing an adoption notice, the successor must reissue the entire tariff in its own name. The reissued tariff must be numbered in the series of the successor carrier, and must contain all original pages without changes in regulations or rates. The transmittal letter must state the tariff is being filed to show a change in the carrier's name pursuant to Section 61.171 of the Commission's Rules. The adoption notice, if used, must read as follows:

The ____________________________________
(Exact name of successor carrier or receiver)
here adopts, ratifies and makes its own in every respect, all applicable tariffs and amendments filed with the Federal Commission by ________ prior to _____.
(predecessor) (date)

§ 61.171 Adoption notice.

When the name of a carrier is changed, its operating control transferred from one carrier to another in whole or in part, or a receiver appointed for the carrier, the receiver or carrier which will thereafter operate the properties shall immediately file and post an adoption notice, numbered in the FCC series of the receiver or successor carrier, reading as follows:

The

(Exact name of adopting carrier or receiver)

hereby adopts, ratifies and makes its own or his own in every respect, all applicable tariffs and amendments thereof filed with the Federal Communications Commission by ________ prior to ____.

(Exact name of the predecessor) (Date)

The ________ here (Exact name of successor carrier or receiver) adopts, ratifies and makes its own in every respect, all applicable tariffs and amendments filed with the Federal Communications Commission by ________ prior to ________.

(predecessor) (date)

§ 61.172 Changes to be incorporated in tariffs of successor carrier.

EXPLANATION

Formerly found at § 61.174.

PROPOSED RULE

§ 61.172 Changes to be incorporated in tariffs of successor carrier.
When only a portion of properties is transferred to a successor carrier, that carrier must incorporate in its tariff the rates applying locally between points on the transferred portion. Moreover, the predecessor carrier must simultaneously cancel the corresponding rates from its tariffs, and reference the FCC number of the successor carrier's tariff containing the rates that will thereafter apply.

[old § 61.172 deleted as archaic]

§ 61.173 Deleted.

EXPLANATION

Archaic.

§ 61.174 Deleted.

EXPLANATION

Relocated to § 61.172.

§ 61.174 Changes to be incorporated in tariffs of successor carrier.

When only a portion of properties is transferred, charges applying locally between points on the transferred portion shall be incorporated in tariffs or supplements of the successor carrier. In all such instances the predecessor carrier shall cancel the corresponding charges from its tariffs or supplements effective on the same date, with reference to the FCC number of the tariff or supplement of the successor carrier for charges applying thereafter.

§ 61.172 Adoption supplements.

In addition to the foregoing adoption notice the successor carrier shall file a consecutively numbered supplement to each of the tariffs covered by the adoption notice, reading as follows:

Effective ______________ this tariff (or his tariff as amended)
(Insert date of adoption notice)
became the tariff of the ______________________
(Exact name of the successor carrier)
pursuant to its adoption notice FCC No. ___.

§ 61.173 Adoption supplements to contain no other matter.

Supplements issued pursuant to § 61.172 shall contain no other matter.

SUSPENSIONS

§ 61.191 Carrier to file supplement when notified of suspension.

EXPLANATION

No change.

PROPOSED RULE

§ 61.191 Carrier to file supplement when notified of suspension.
If a carrier is notified by the Commission that its tariff filing has been suspended, the carrier must file immediately a consecutively numbered supplement without an effective date, which specifies the schedules which have been suspended.

§ 61.191 Carrier to file supplement when notified of suspension.

Whenever an order of suspension is received by a carrier against whose schedules the order of suspension is directed, it shall be the duty of such carrier to file immediately a consecutively numbered supplement which shall bear no effective date, and which shall announce the suspension of the schedules named in the order.

§ 61.192 Contents of supplement announcing suspension.

EXPLANATION

No change.

PROPOSED RULE

§ 61.192 Contents of supplement announcing suspension.

(a) A supplement announcing a suspension by the Commission must specify the term of suspension imposed by the Commission.

(b) A supplement announcing a suspension of either an entire tariff or a part of a tariff publication, must specify the applicable tariff publication effective during the period of suspension.

§ 61.192 Contents of supplement announcing suspension.

(a) A supplement, announcing suspension of schedules by the Commission, shall state that such schedules are suspended until the date stated in the order of suspension, or until further ordered by the Commission.

(b) When the order of the Commission directs suspension of an entire tariff or supplement, the supplement announcing such suspension shall contain a reference to the tariff or supplement where schedules remaining in effect will be found during the period of suspension or until further ordered by the Commission.

(c) When the order of the Commission directs the suspension of a part of a tariff or supplement which, except as to such part, is allowed to become effective, the supplement announcing the suspension shall also contain, as reissued items, the charges and regulations applicable during the period of suspension, or shall make specific reference by FCC number or numbers, to the tariff or supplements where they will be found.

(d) When the Commission has suspended a supplement in whole or in part, it may occur that prior to the filing of the supplement announcing suspension, a carrier will file a later supplement bringing forward, either with or without change, the matter suspended in the previous supplement. In such instances the suspension supplement required by the rules in this part shall also specifically cancel from the later supplement such matter, and by amendment to the title page of said later supplement shall eliminate the cancellation of the suspended supplement when the latter is suspended in full, and when a supplement is suspended in part shall provide that such later supplement cancels such previous supplement except portions under suspension. Tardiness in filing supplements announcing suspension may result in the rejection by the Commission of the supplement which cancels the suspended matter.

§ 61.193 Vacation of suspension order; supplements announcing same; etc.

EXPLANATION

No change.

PROPOSED RULE

§ 61.193 Vacation of suspension order; supplements announcing same; etc.
If the Commission vacates a suspension order, the affected carrier must issue a supplement or revised page stating the Commission's action as well as the lawful schedules.

§ 61.193 Vacation of suspension order; supplements announcing same; etc.

If upon final determination by the Commission matter suspended is found not unlawful, and the Commission directs that the order of suspension be vacated or the case dismissed, the affected carrier or carriers shall issue a supplement or revised page announcing the vacation of the order of suspension and provide by proper publication for the application of the lawful schedules and otherwise comply with such orders of the Commission as it may make.

APPENDIX E

PROPOSED PART 1 RULES AND SECTION-BY-SECTION ANALYSIS

§ 1.773 Petitions for suspension and investigation, or rejection of new or revised tariff filings.

(a) *Petition.* - (1) Content.

(i) Petitions seeking suspension and investigation, or rejection of a new or revised tariff filing or any provision of such a publication, must specify the pertinent Federal Communications Commission tariff number and carrier transmittal number; the matters protested; and the specific reasons why the tariff warrants suspension and investigation, or rejection. When a single petition asks for more than one form of relief, it must separately and distinctly plead and support each form of relief. However, no petition may ask that it also be considered a formal complaint. Formal complaints must be separately lodged, as provided in Section 1.721.

(ii) For purposes of this section, tariff filings by non-dominant carriers will be considered *prima facie* lawful, and will not be suspended by the Commission unless the petition requesting suspension shows:

(a) That there is a high probability the tariff would be found unlawful after investigation;

(b) That the harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;

(c) That irreparable injury will result if the tariff filing is not suspended; and

(d) That the suspension would not otherwise be contrary to the public interest.

*****

(b)(1) *

*****

(iv) Where all petitions against a tariff filing have not been filed on the same day, the publishing carrier may file a consolidated reply to all the petitions. The time for filing such a consolidated reply will begin to run on the last date for timely filed petitions, as fixed by (a)(1)(i)–(iii) of this section, and the date on which the consolidated reply is due will be governed by (b)(1)(i)–(iii) of this section.

§ 1.773 Petitions for suspension and investigation, or rejection of new or revised tariff filings.

EXPLANATION

Proposed § 1.773 consolidates present § 61.39(c) so that the requirements for petitions against tariff filings by non-dominant carriers would appear with requirements for petitions against tariff filings by dominant carriers, which are already found in § 1.773(a).

In addition, proposed § 1.773(a)(1)(i) has been clarified to explicitly recognize that petitions for suspension also seek investigation of the challenged tariff provision(s).

Finally, proposed § 1.773(b)(7)(iv) formally permits filing carriers to file a consolidated reply to petitions submitted on different days. At present, such staggered petitions trigger different reply periods, so that carriers seeking to file a consolidated reply must request waiver of this paragraph.

PROPOSED RULE

§ 1.773 Petitions for suspension and investigation, or rejection of new or revised tariff filings.

(a) *Petition.*—(1) Content.

(i) Petitions seeking suspension and investigation, or rejection of a new or revised tariff filing or any provision of such a publication, must specify the pertinent Federal Communications Commission tariff number and carrier transmittal number; the matters protested; and the specific reasons why the tariff warrants suspension and investigation, or rejection. When a single petition, asks for more than one form of relief, it must separately and distinctly plead and support such form of relief. However, no petition may ask that it also be considered a formal complaint. Formal complaint must be separately lodged as provided in Section 1.721.

§ 1.773 Petitions for suspension or rejection of new tariff filings.

(a) *Petition.*—(1) *Content.* Petitions seeking suspension or rejection of a new tariff filing or any provision thereof shall specify its Federal Communications Commission tariff number and carrier transmittal number, the items against which protest is made, and the specific reasons why the protested tariff filing warrants suspension or rejection under the Communications Act. When more than one form of relief is sought in a single petition, arguments supporting different forms of relief shall be separately and distinctly set forth. No petition shall include a prayer that it also be considered a formal complaint. Any formal complaint shall be filed as a separate pleading as provided in § 1.721.

(ii) For purposes of this section, tariff filings by non-dominant carriers will be considered *prima facie* lawful, and will not be suspended by the Commission unless the petition requesting suspension shows:

(a) That there is a high probability the tariff would be found unlawful after an investigation;

(b) That the harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;

(c) That irreparable injury will result if the tariff filing is not suspended; and

(d) That the suspension would not otherwise be contrary to the public interest.

*

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(b)(1) *

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(iv) Where all petitions against a tariff filing have not been filed on the same day, the publishing carrier may file a consolidated reply to all the petitions. The time for filing such a consolidated reply will begin to run on the last day for timely filed petitions, as fixed by (a)(1)(i)–(iii) of this section, and the date on which the consolidated reply is due will be governed by (b)(1)(i)–(iii) of this section.

§ 61.39 Tariff filings for service offerings by non-dominant carriers.

(c) Any tariff filing complying with the requirements of this Section shall be considered to be *prima facie* lawful and will not be suspended unless a party requesting suspension is able to show each of the following:

(1) That there is a high probability that the tariff would be found to be unlawful after an investigation;

(2) That any harm alleged to competition would be more substantial than the injury to the public arising from the unavailability of the service pursuant to the rates and conditions proposed in the tariff filing;

(3) That irreparable injury will result if suspension does not issue; and

(4) That the suspension would not otherwise be contrary to the public interest.

CATV Program Exclusivity, Network Programming
CATV Special Relief
Rules, Waiver of

Request for waiver of Section 76.92 of the Rules granted. Petitioner demonstrated projected audience loss to station from waiver of nonduplication protection of only 0.56%.
–*Atchison Cablevision, Inc.*

FCC 83–437

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re: ATCHISON CABLEVISION, INC. Atchison, Kansas Petition for Special Relief	CSR-2018 KS0008

MEMORANDUM OPINION AND ORDER

(Adopted: September 22, 1983 Released: October 13, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT.

1. On October 26, 1981, Atchison Cablevision, Inc. (hereinafter "ACI"), operator of a cable television system serving Atchison, Kansas, filed a "Petition for Special Relief" seeking a waiver of Section 76.92 of the Commission's Rules. Absent the requested waiver, ACI would have to honor the request for network program nonduplication protection made of it by Elba Development Corp. (hereinafter "KQTV"), licensee of Station KQTV (ABC, Channel 2), St. Joseph, Missouri. ACI's petition is opposed by KQTV, and ACI has replied.

2. In support of its petition, ACI notes initially that it was recently acquired by Communications Services, Inc.[1] ACI next contends that the request made of it by KQTV is defective for several reasons: (1) KQTV's form requests "network exclusivity" rather than "network nonduplication protection"; (2) KQTV requests protection against Station KETV (ABC, Channel 7), Omaha, Nebraska, which ACI does not carry; (3) KQTV requests protection against Station KMBC-TV (ABC, Channel 9), Kansas City, Missouri, whose program-

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[1] Communications Services, Inc. is a multiple cable system operator, and a wholly-owned subsidiary of Tandem Productions Inc.

ming ACI need not delete pursuant to Section 76.92(g) of the Rules, because KMBC-TV is significantly viewed in Atchison;[2] (4) KQTV lists Station KBMA-TV (Ind., Channel 41), Kansas City, Missouri, on its request form, although KBMA-TV is not a network affiliate, nor are any of its programs listed for deletion by KQTV; and (5) KQTV's October 1981 form, although dated September 23, 1981, was not received by ACI until October 9, 1981,[3] which does not constitute timely notification, pursuant to Section 76.94(a)(1) of the Rules. Accordingly, contends ACI, it need not honor KQTV's request, although part of the form also requests protection against Station WIBW-TV (CBS/ABC, Channel 13), Topeka, Kansas. Even if KQTV's request is valid, contends ACI, WIBW-TV should not be subject to nonduplication deletions, because it is entitled to request mandatory carriage on ACI's system. ACI argues that it should not be required to delete programming from a station that it is required to carry, and that similar considerations led to the adoption of Section 76.92(g) of the Rules. In addition, ACI notes that WIBW-TV's ABC affiliation is only secondary, and that KQTV's request lists only 31/2 hours per week of regularly scheduled duplicating ABC programming weekdays on WIBW-TV to be blacked out, "plus a few hours of sports each weekend." Accordingly, claims ACI, it should not be required ". . . to go [through] the trouble and expense of deleting such an insignificant amount of programming." Finally, utilizing a formula set forth in *Texas Community Antennas, Inc. d/b/a Nacogdoches Cable TV* (Nacogdoches, Texas), FCC 78-525, 68 FCC 2d 1271 (1978), ACI argues that grant of its requested waiver would result in an audience loss to KQTV of 0.039%, which ACI contends is insignificant *per se*.

3. KQTV opposed ACI's petition on December 7, 1981.[4] KQTV denies that its request for protection may be ignored by ACI. KQTV argues: (1) that the Commission itself has used the term "network exclusivity" to refer to nonduplication protection, citing the *First Report and Order in Docket Nos. 19995 and 18785*, FCC 75-413, 52 FCC 2d 519;[5] (2) that KQTV recognizes that its request form may have been overinclusive in a particular situation, and stated so in a July 23, 1981, memorandum to all cable systems receiving KQTV's forms;[6] and (3) that the October 8, 1981, letter cited by ACI was

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[2] *Reconsideration of the Cable Television Report and Order*, FCC 72-530, 36 FCC 2d 326, 403 app. B (1972).

[3] ACI states that KQTV's request form was included with a letter dated October 8, 1981.

[4] Because ACI did not perfect service of its petition, nor submit the required affidavit, until November 9, 1981, opposition and reply periods are based on this date, as recognized by ACI.

[5] Nevertheless, effective December 1981, KQTV states that it is revising its form's title.

[6] Effective December 1981, KQTV states it is sending a similar memo, and is eliminating KBMA-TV from its request forms.

separate from KQTV's October 1981 notification, which was in fact mailed on September 23, 1981. KQTV contends that WIBW-TV's status as a signal entitled to mandatory carriage on ACI's system is irrelevant to the system's obligation to comply with the nonduplication rules. KQTV notes that ACI has submitted no evidence to show that compliance with the rules would result in economic hardship to it, citing *Cable Television Co. of Illinois* (Gibson City, Illinois), Mimeo No. 17992, 45 RR 2d 1210, 1212 (1979), and *TV Cable Co. of Andalusia, Inc.* (Andalusia, Alabama), FCC 74–1167, 49 FCC 2d 718 (1974). In addition, KQTV argues that ACI's showing of projected impact had an improper fractionalization factor, and also is not a marketwide showing, but includes only impact from ACI's system, and hence is insufficient pursuant to *Texas Community Antennas, Inc., supra.*

4. ACI replied to KQTV on December 28, 1981. ACI initially reiterates its earlier arguments concerning the sufficiency of KQTV's notification. ACI contends that its impact analysis is sufficient, because "there are no other similarly situated systems within the 55-mile zone of protection accorded KQTV."[7] Eliminating those systems on which KQTV would not be entitled to protection—due to subscriber size, lack of carriage of WIBW-TV, significantly viewed status for WIBW-TV, or lack of mandatory carriage rights for KQTV—only ACI's Atchison system remains. In addition, notes ACI, given WIBW-TV's limited duplicating of KQTV's programming, the 10% fractionalization factor utilized by ACI is proper, rather than the 50% factor suggested by KQTV.

5. "We have repeatedly stated that for our nonduplication rules . . . to function as intended, we must expect a high degree of good faith and cooperation between the cable operators and broadcasters." *Colonial Cablevision of Revere, Inc., et al.*, FCC 80–7, 76 FCC 2d 56, 60 (1980) (footnote omitted). *See also Cable TV of Durango, Inc.* (Durango, Colorado), FCC 77–462, 65 FCC 2d 415, 419 (1977); *Carthage Cablevision, Inc.* (Carthage, Missouri), FCC 77–247, 64 FCC 2d 545, 547 (1977). The fact that KQTV's notice referred to "network exclusivity," or may have been overinclusive, did not render it inoperative, and ACI cannot rely on such factors to avoid its legitimate obligations pursuant to our rules.[8] *See Colonial Cablevision of Revere, Inc.*, 76 FCC 2d at 59–60. The question of the timeliness of KQTV's notification is, however, of greater moment,

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[7] KQTV's zone of protection would be further circumscribed by the superseding 35-mile zones of WIBW-TV and of KMBC-TV.

[8] In fact, ACI was apparently able to understand its obligations without difficulty, as evidenced by its arguments in support of the instant petition. To the extent, however, that ACI's petition seeks a waiver vis-a-vis Stations KETV, KMBC-TV, and KBMA-TV, it will be dismissed as moot. ACI's request is effective, however, insofar as it seeks a waiver against WIBW-TV's ABC programming. *See* paragraph 2, *supra.*

especially in view of the conflicting allegations made by ACI and by KQTV, albeit unsupported by any evidence. Nevertheless, in view of our resolution below of ACI's waiver request, we need not address this question further.

6. In order to obtain a waiver of the network nonduplication rules, a petitioner must submit specific evidence demonstrating adverse economic impact on the cable system as a consequence of compliance or, conversely, evidence demonstrating through a similarly specific factual showing that waiver will not adversely impact the broadcaster seeking protection. *See Texas Community Antennas, Inc.*, 68 FCC 2d at 1279–80. ACI has submitted a showing, based on a Commission formula, which it contends demonstrates that grant of its requested waiver, even on a marketwide basis, will not significantly impact KQTV adversely. We note, however, that while ACI legitimately excludes certain cable systems from its analysis, *see, e.g., Northern New England Television (WNNE-TV)*(Hanover, New Hampshire), FCC 80–721, 83 FCC 2d 418, 425–426 (1980), *recon. denied*, FCC 82–124, 89 FCC 2d 458 (1982), it is not warranted in excluding those systems voluntarily carrying KQTV—the Maryville and St. Joseph, Missouri systems—even though its carriage is not mandated on those systems. Moreover, while ACI is correct in its assertion that the limited amount of duplicating programming should be considered as a factor in an impact analysis (*see* paragraph 4, *supra*), such an analysis must still account for the equal likelihood of a subscriber choosing to view KQTV or WIBW-TV during those periods of duplication, however limited. Nevertheless, a marketwide staff analysis of all relevant systems reveals that impact resulting from grant of the requested waiver would be a 0.56% audience loss.[9]

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[9] The staff analysis utilizes the formula:

$$\frac{A \times B \times C \times D \times E}{F} \times 100 = \%\ \text{Audience Diversion}$$

where,

A = The number of affected cable subscribers. (Source: *1982 Cable & Stations Coverage Atlas*and *Television Factbook*, Services Volume, 1981–82 Edition, No. 50);

B = The percentage of ADI households using television (HUTs or market rating), on average, during the 9 AM to Midnight time period. For St. Joseph this figure is 38% (Arbitron, *Daypart Audience Estimates Summary*, February 1982);

C = KQTV's average all day share of viewing in cable households in the county where each system is located. (Source: Arbitron, *County Coverage Surveys, 1982, CATV-Controlled*, when available);

D = This factor is an estimate of the percentage of KQTV's broadcast week which would be affected by the loss of nonduplication protection. A

In addition, KQTV has not attempted to show with specific factual data that its financial condition is such that the anticipated losses of revenue would adversely affect the public interest. We are not persuaded that the incremental two-step procedures which were first used nearly six years ago with respect to waivers of the then distant television signal carriage rules, should be followed herein or in future network nonduplication protection waiver requests involving impact analyses.[10] Those earlier *ARTEC*procedures were burdensome and costly both to the parties involved and to the Commission and its processes. They were also highly litigious, often unnecessarily prolonging the Commission's ultimate resolution of the requested waiver. Moreover, the Commission's disposition of numerous *ARTEC*cases since the institution of these procedures several years ago has established our expertise in this form of analysis, and such widespread precedent has afforded potential petitioners and objectors a sufficient basis for knowledge of the showings necessary for such an analysis. In view thereof, we must decline to apply such inefficient procedures to our processing of waiver requests such as these. Once petitioner has made its showing of potential impact, it

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comparison of KQTV's programming schedule with that of WIBW-TV given by Arbitron in its February 1981 *Market Summary*reveals that 7% of the programming is duplicative, as ACI has suggested (*see*paragraphs 4 and 6, *supra*);

E = A fractionalization factor of 50% which assumes the equal likelihood of a viewer choosing the distant signal over the local station when both are showing the same program; and

F = An estimate of KQTV's average 9 AM to Midnight audience. (Source: Arbitron, *Daypart Audience Estimates Summary, February 1982*).

The expected audience diversion is then calculated for each relevant system as:

Atchison, Kansas

$$\frac{1{,}825 \times .38 \times .09 \times .07 \times .50}{12{,}000} = .0002$$

Maryville, Missouri

$$\frac{2{,}800 \times .38 \times .32 \times .07 \times .50}{12{,}000} = .0010$$

St. Joseph, Missouri

$$\frac{20{,}700 \times .38 \times .19 \times .07 \times .50}{12{,}000} = .0044$$

TOTAL = .0056

The total estimated potential impact of granting ACI's waiver request would therefore be a 0.56% audience loss for KQTV.

[10] *Arlington Telecommunications Corporation d/b/a ARTEC*(Arlington County, Virginia), FCC 78-781, 69 FCC 2d 1923 (1978), *aff'd on recon.* FCC 79-73, 70 FCC 2d 2291 (1979), *stay denied*, FCC 79-487, 73 FCC 2d 766 (1979), *appeal dismissed sub nom. The Committee to Balance the Impact Gaff and to Make ARTEC Constitutional v. FCC*, No. 79-1303 (D.C. Cir. Feb. 5, 1982).

will then be incumbent upon any opposing station claiming adverse impact to submit in its opposition pleadings a specific showing, supported by specific factual data (1) as to the station's financial condition, and (2) that the station's anticipated losses of revenue would adversely affect the public interest in light of the station's condition.[11] We must conclude, based on an analysis of the impact evidence, that grant of the waiver requested by ACI will not impair KQTV's ability to operate in the public interest.

7. In view of the foregoing, we find that grant of the waiver to the extent indicated at note 8, *supra*, requested by ACI is in the public interest.

8. Accordingly, IT IS ORDERED, That the "Petition for Special Relief" (CSR-2018) filed October 26, 1981, by Atchison Cablevision, Inc. IS GRANTED to the extent indicated above, and in all other respects IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[11] We caution interested parties, however, that all pertinent information available should be presented at this time. Pursuant to Section 1.106(b)(3) of the Rules, petitions for reconsideration which do not rely upon new facts or changed circumstances are subject to dismissal.

Common Carrier, Interconnection, Connecting Arrangements
Common Carrier, International Record Carrier
Common Carrier, Service, Discontinuance of
Exception, to Initial Decision
Private Line Service
Tariff, Revision of

Commission adopted Final Decision denying exceptions to Initial Decision of ALJ. ALJ correctly concluded that tariff revision eliminating interruption of service credit granted by AT&T to its private line customers when service outages of more than 30 minutes occurred on interconnected international record carrier facilities was not contrary to the public interest nor contrary to Section 202(a) of the Act.
-AT&T Co.
Docket No. 21122

FCC 83-400

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE AND TELEGRAPH Co.	Docket No. 21122
Revisions to Tariff F.C.C. No. 260	Transmittal No. 12627

FINAL DECISION

(Adopted September 9, 1983; Released September 21, 1983)

BY THE COMMISSION:

1. Before the Commission are exceptions to the Initial Decision of Administrative Law Judge Frederick W. Denniston, FCC 78D-40, released July 7, 1978 (ID), filed by ITT World Communications Inc. (ITT), RCA Global Communications, Inc. (RCA), Western Union International, Inc. (WUI), the U.S. Department of Defense (DOD), and the Separated Trial Staff of the Common Carrier Bureau (Trail Staff). The ID concluded that a proposed tariff revision cancelling an interruption of service credit provision for the American Telephone and Telegraph Co.'s (AT&T) private line service was not unlawful under Section 202 of the Act nor contrary to the public interest. For reasons explained below, we deny the exceptions and adopt the ID's

findings and ultimate conclusions, adding such comments as we consider necessary.[1]

Background and Exceptions

2. This proceeding grows out of tariff revisions filed by AT&T on October 26, 1976.[2] AT&T's stated purpose in filing these revisions was to comply with directives issued by the Commission in *American Telephone and Telegraph Co.*, 60 FCC 2d 939 (1976) (*1976 Order*).[3] Among other things, that decision required AT&T to justify or eliminate interconnection restrictions in Tariff F.C.C. No. 260 which were discriminatory.[4] Thus, along with tariff revisions specifically required by the *1976 Order*, AT&T proposed to delete from paragraph 2.4.8(B) of Tariff F.C.C. No. 260 an interruption of service allowance it granted solely to those private line customers whose service was interconnected to overseas facilities of international record carriers (IRCs). Specifically, Paragraph 2.4.8(B) gave overseas customers a billing credit against AT&T's monthly private line charges whenever domestic lines provided by AT&T were unusable due to outages of at least 30 minutes' duration on interconnected IRC facilities, even when AT&T's own equipment was functioning.

3. After considering petitions filed by IRCs and others challenging these tariff revisions, the Commission found that substantial public interest considerations would be raised if AT&T were to cancel the interruption allowance.[5] Of particular concern were the

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[1] Also denied is DOD's request for oral argument on the exceptions. We find that the issues and the parties' positions are adequately presented in the exceptions and would not be clarified by oral argument.

[2] The procedural history of this proceeding is detailed in the ID at paras. 4–16.

[3] That decision rejected tariff revisions which would have imposed general restrictions on the interconnection of AT&T's private line services to other common carriers (OCCs). 60 FCC 2d at 942. Because these restrictions would have prevented OCCs from obtaining termination or origination of private line service at non-customer premises, the Commission concluded that they were in violation of AT&T's duty under Section 201(a) of the Act to provide service upon reasonable request. *Id.* at 943–44. AT&T was ordered to refile tariff revisions consistent with this determination. *Id.* at 946.

[4] *Id.* at 945. The Commission pointed out that AT&T did not consistently limit interconnection of Tariff F.C.C. No. 260 private lines to customer premises since, for example, the same lines could be connected on the premises of an IRC when AT&T's customer desired to interconnect with IRC services. It found that such discrimination, without any justification for the disparity in treatment, was unlawful under Section 202(a) of the Act. *Id.* at 944.

[5] The IRCs joined other carriers and customers in petitioning for rejection or suspension of other revisions filed by AT&T under the same transmittal. However, these petitions were denied and only the interruption allowance provision was suspended and set for investigation. American Telephone and Telegraph Co., 64 FCC 2d 528 (1977), *recon. denied*, 66 FCC 2d 3 (1977) (Designation Order).

possible adverse effects that cancellation of the interruption allowance might have on IRC hinterland customers.[6] At the time, the Commission required the domestic hinterland portion of international record service to be carried only by domestic carriers. As a result, if the interruption allowance were cancelled, the IRCs' hinterland customers would not receive credit for the domestic segment when interconnected IRC services failed even though they had no choice but to utilize services of a domestic carrier such as AT&T to access overseas IRC services. 64 FCC 2d at 536. Thus, the *Designation Order* suspended the tariff revision for the full statutory period and set the matter for investigation and hearing on the following issues:

> 1. Whether and to what extent such revision will subject any person or class of persons to an undue or unreasonable prejudice or disadvantage or will give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act.[7]
>
> 2. Whether the revision proposing deletion of the service interruption allowance to overseas customers is in the public interest.

64 FCC 2d at 537.[8]

4. On the basis of the record developed during the hearings, the ID concluded that AT&T's tariff proposal cancelling the interruption of service credit for interconnected AT&T/IRC facilities was neither unlawfully discriminatory under Section 202(a) of the Communications Act, 47 U.S.C. §202(a),[9] nor contrary to the public interest. ID, at para. 55. In reaching these conclusions, the Presiding Judge determined that the "unmistakable mandate" of the *1976 Order* required AT&T to treat the IRCs no differently than other OCCs. ID at para. 50. The ALJ further found that AT&T's discrimination could be eliminated by either cancelling the interruption allowance for IRCs or extending the provision to interconnected OCC facilities. *Id.* For these reasons, the ALJ found that cancellation of the IRC credit would result in the same treatment for domestic and international

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[6] "Hinterland" customers are customers located in those parts of the United States mainland outside of the five authorized "gateway" cities to which IRC service then was restricted. ID at n. 9.

[7] We noted in our order denying petitions for reconsideration of the *Designation Order* that this inquiry was framed with sufficient breadth to include investigation of the IRCs' allegations that cancellation of the interruption allowance allowed AT&T to obtain an unreasonable preference on the United States mainland to Hawaii route since AT&T continued to grant an interruption allowance for the service it provided in conjunction with the Hawaiian Telephone Co. 66 FCC 2d at 5.

[8] Although the five month suspension period ended July 19, 1977, the effective date of the revision was deferred voluntarily until June 19, 1980.

[9] Section 202(a) prohibits unjust or unreasonable discrimination in the provision of like communication service, or undue or unreasonable preference, prejudice or disadvantage.

OCC service and was consistent with Section 202(a) of the Act. ID at paras. 50, 52.[10] Finally, the ALJ found that since extension of the interruption allowance to IRCs and not OCCs was discriminatory, cancellation of this provision was in the public interest. ID at para. 54.

5. The Trial Staff, DOD, ITT, RCA and WJI contend in their exceptions that the ALJ erred in finding the *1976 Order* a "mandate" for AT&T to treat the IRCs no differently than the OCCs. They also contest the finding that cancellation of the interruption allowance is both justified and required. According to the excepting parties, the *1976 Order* did not address the interruption of service credit. In fact, the Commission would never have designated the matter for investigation had that decision required AT&T to cancel this tariff provision, they maintain. Moreover, WJI asserts, the *1976 Order* required AT&T only to justify any existing disparate treatment between OCCs and IRCs through showings of economic or technical harm, not to remove all discrimination. The excepting parties also contend that any disparate treatment of the IRCs is justified by public interest considerations and thus is not unlawful under Section 202(a). In this vein, they argue that the interruption allowance benefits IRC customers at negligible financial cost and risk to AT&T and is consistent with C.C.I.T.T. recommendations for international comity in private line service.[11] Furthermore, it is unlawfully discriminatory for AT&T to cancel the interruption allowance in connection with IRC service when it continues to give such a credit for the service it offers in conjunction with independent telephone companies, say the excepting parties. Specifically, they assert that AT&T obtains an unlawful preference *vis-a-vis* the IRCs on the mainland to Hawaii[12] route because it can offer its customers a

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[10] The ALJ noted, however, that AT&T still grants interruption allowances for the private line service it provides in conjunction with other carriers serving offshore locations. He differentiated those cases on the grounds that AT&T has responsibility and control over the entire end-to-end service, while in AT&T/IRC international service, AT&T only provides service which terminates at the IRC operating center. ID at para. 53. The ALJ also found that while AT&T's ability to grant an interruption allowance on the service it provides jointly with the Hawaiian Telephone Company might give it a "minimal" competitive advantage vis-a-vis the IRCs on the mainland to Hawaii route, the record did not support concluding that the preference was undue or unreasonable. ID at paras. 22, 41.

[11] C.C.I.T.T. ("International Telegraph and Telephone Consultative Committee") is a permanent organ of the International Telecommunication Union, which itself is an agency of the United Nations established to provide a forum for developing standardized communications practices and procedures on a world-wide basis. Part 4, Section 4.5 of C.C.I.T.T. Recommendation D.1 concerns international provide line service. ID at n. 10.

[12] Hawaii was considered an international service point prior to amendment of Section 222 (a)(10) in 1980. Section 222 of the Act was subsequently amended by the Record Carrier Competition Act of 1981, Pub L. No. 97-130, §2, 95 Stat. 1687 (1981), 47 U.S.C. §222 ("RCCA"). At the present time, all states, territories and

credit when outages occur on interconnected Hawaiian Telephone Co. facilities.

Discussion

6. At the time we initiated this investigation, AT&T and the IRCs did not compete directly in the international arena. Under our decision in *American Telephone and Telegraph Co.,* 37 FCC 1151 (1964) (TAT-4), AT&T was barred from providing international record services. The IRCs did not provide any pure voice services although not specifically barred by the Commission. The intent of the voice/record dichotomy established in *TAT-4* was to shield the IRCs from AT&T's market power.[13]

7. The provision of record communications was further divided into two segments, domestic and international. The major domestic record carrier, Western Union Telegraph Co., was prevented by statute from providing international service.[14] The IRCs, as a matter of policy, were limited to providing record transmission between the United States mainland and points abroad from five "gateway" cities.

8. Consistent with these Commission policies, customers originating or terminating international communications in areas of the United States outside the gateways (the "hinterland") were required to use the network of AT&T or another domestic carrier to reach an IRC's gateway. These hinterland customers, who were obligated to take pieced-out service[15] to satisfy their communications requirements, thus had no choice, absent an interruption of service adjustment, but to risk paying for functioning but useless domestic facilities when interconnected overseas facilities failed. In contrast, a domestic customer requiring a purely domestic communication service could choose to avoid the risk of paying for functioning but useless facilities inherent in pieced-out service by instead selecting end-to-end service from one carrier or joint-through service.[16]

9. The core issue in this proceeding is whether AT&T's voluntary action removing the discriminatory interruption allowance provision from its tariff was reasonable. Thus, the exceptions claiming that the *1976 Order* did not compel or mandate elimination of the interruption allowance miss the point. The *1976 Order* is relevant here only

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possessions are considered to be domestic points under Section 3 (g) of the Act, 47 §U.S.C. §3(g).

[13] 37 FCC at 1159. The IRCs only, and not AT&T, were authorized to provide overseas private lines for alternate voice-record use. Aside from the mainland to Hawaii route, AT&T was generally prohibited from offering alternate voice-record service in competition with the IRCs. *Id.* at 1160–61.

[14] 47 U.S.C. §222. The RCCA subsequently eliminated this restriction.

[15] Pieced-out service is end-on-end service, in this case provided by more than one carrier.

[16] Joint through service is provided by more than one carrier, although one carrier assumes end-to-end responsibility.

to the extent that it reflects the Commission's policy against interconnection restrictions in AT&T's private line tariffs which were discriminatory. AT&T considered it a basis for reviewing such discriminatory tariff provisions and, as a result, filed this revision cancelling the interruption allowance credit which had been extended only to IRC customers. The ID found that AT&T's voluntary removal of this discriminatory provision from its tariff was both consistent with Section 202 and in the public interest. ID at para. 55. We believe that these findings are sound.

10. While the excepting parties contend that the ID ignores evidence in the record that there were public interest benefits to hinterland customers from the interruption allowance,[17] we note that the ID concluded, based on the record, that cancellation of the provision would not adversely affect the quality or reliability of overseas private line service nor result in a deterioration of service or increase in the number or duration of outages. ID at para. 39. In fact, the record indicates that there were few, if any, requests for credits due to interruptions of IRC services. DOD characterizes itself in its exceptions as one of the largest, if not the largest, users of interconnected AT&T/IRC facilities. The record indicates that DOD utilized 135 interconnected AT&T/IRC circuits during the period May 1, 1976 to May 1, 1977, and that the total amount of credit given by AT&T to DOD for IRC caused interruptions of service on 82 circuits was $331.37, or an average of $4.04 interruption credit per circuit. *See* Tr. 176, ID at para. 38. The *ID* also found that changes in communications—such as the introduction of satellite circuitry, the entry of specialized carriers, and the interconnection of carriers—had drastically altered industry conditions since 1963, when AT&T had introduced the interruption allowance under the belief that its financial risk was minimal.[18] In light of these findings, we do not

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[17] In fact, the ALJ found that the interruption allowance had worked well for a number of years, that no IRC or their customers would be benefited by cancellation of the credit, and that the practice was in accord with C.C.I.T.T. recommendations. ID at para. 51. However, the ALJ did not consider these factors sufficient to justify the discriminatory tariff provision. We also note that cancellation of the interruption allowance is not inconsistent with C.C.I.T.T. recommendations either. Recommendation D.1, §4.5, by its own terms, recognizes that some carriers may grant only a partial interruption allowance.

[18] ID at paras. 26, 49. The record is clear that the interruption allowance was a carrier-initiated credit which AT&T implemented in response to IRC requests. ID at para. 47. In part, AT&T proposed this arrangement in order to ameliorate opposition on behalf of the IRCs to AT&T's then pending applications for construction of international submarine cables. *Id.* at para. 26; *see* TAT-4, 37 FCC at 1159. The credit was implemented also because AT&T apparently regarded it as a means to meet what it perceived as legitimate IRC customer requirements for overseas service and because AT&T believed its risk was minimal, given the fact that virtually all the interconnected IRC facilities in use had been constructed by AT&T. ID at para. 26. AT&T subsequently filed tariff provisions in conformance with the *TAT-4* authorization.

believe that public interest factors warrant our finding that AT&T's cancellation of the interruption allowance was unreasonable.

11. Moreover, Commission decisions and Congressional legislation subsequent to the ID have effected structural changes in the international communications markets which expand the scope of IRC operations and now make it possible for IRCs to offer end-to-end service, thus eliminating the requirement that IRC hinterland customers piece-out the domestic land haul portion of service to a domestic carrier in order to satisfy overseas communications requirements. For example, our decision in *International Record Carriers' Scope of Operations in the Continental United States*, 76 FCC 2d 115, *stay denied*, 77 FCC 2d 929, 78 FCC 2d 1213 (1980), *aff'd sub nom. Western Union Telegraph Co. v. FCC*, 665 F.2d 1126 (D.C. Cir. 1981) (*Gateways Order*), authorized the IRCs to expand the scope of their domestic operations from five to twenty-one gateways. The RCCA later established a new structure for full and fair participation by record carriers in the provision of domestic and international record services to the public by removing the statutory restrictions on the provision of certain record communications services. Finally, we have eliminated the voice/record dichotomy in the provision of international services and have authorized full market entry by AT&T and the IRCs. *Overseas Communications Services*, FCC 82–547, released December 22, 1982.[19] These changes have eliminated the circumstances and potential problems which originally prompted our investigation of AT&T's tariff proposal in the *Designation Order*.

12. The final matter to be addressed is the IRCs' claim that elimination of the interruption allowance results in an unlawful preference or unreasonable discrimination because AT&T provides such an allowance in connection with the joint-through service AT&T offers with independent telephone companies. The latter arrangement, however, is a function of the operating agreements between AT&T and the independent telephone companies in providing joint through service. The record indicates that AT&T assumes overall responsibility and control for the joint-through service it provides with the independent telephone companies. ID at para. 53. In contrast, when AT&T provides a portion of an end-on-end service with the IRCs, AT&T's responsibility for its segment terminates at the IRC operating center. *Id.* Given the differences in these arrangements, we do not believe that Section 202(a) concerns are raised.

Order

13. Accordingly, IT IS ORDERED That the Initial Decision of Administrative Law Judge Frederick W. Denniston, FCC 78D-40, released July 7, 1978, is ADOPTED as amplified above;

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[19] Report and Order in Docket No. 80–632, 48 Fed. Reg. 797, January 7, 1983.

14. IT IS FURTHER ORDERED, That the exceptions filed by ITT World Communications Inc., RCA Global Communications, Inc., Western Union International, Inc. the Separated Trial Staff of the Common Carrier Bureau, and the U.S. Department of Defense ARE DENIED.

15. IT IS FURTHER ORDERED, that the request for oral argument made by the U.S. Department of Defense IS DENIED.

16. IT IS FURTHER ORDERED, That Docket No. 21122 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

FCC 78D-40

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY Revisions to Tariff F.C.C. No. 260	Docket No. 21122 Transmittal No. 12627

Appearances

William D. Goddard, *Lee S. Cutcliff*, and *Alfred C. Partoll* on behalf of the American Telephone and Telegraph Company; *William F. Finnegan* and *Alfred G. Walton* on behalf of the American Telephone and Telegraph Long Lines; *Walter H. Morse* and *Donald Elardo* on behalf of RCA Global Communications, Inc.; *Kathryn McDonnell* and *Marc N. Epstein* on behalf of Western Union International, Inc.; *Roderick A. Mette* on behalf of TRT Telecommunications Corporation; *J. Randolph MacPherson* on behalf of the Department of Defense; *Michael Yourshaw, John Baskin, Jack D. Sidorov, Aloysius McCabe* on behalf of Associated Press and ANPA; *Joseph M. Kitner* and *Peter M. Andersen* on behalf of the Computer and Business Equipment Manufacturers' Association; *John A. Ligon* and *Sandra Kincaid* on behalf of ITT World Communications Inc.; and *Paul McDonough* on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE FREDERICK W. DENNISTON

(Issued June 20, 1978; Released July 7, 1978)

Preliminary Statement

1. The parties hereto have undertaken to file joint proposed findings of fact which were drafted by Respondent and agreed to by the parties. This commendable effort has greatly assisted the Presiding Judge. Each party reserved the right to, and in fact has, supplemented its joint proposed findings with certain reservations and/or additions.

2. With but few changes, the joint proposed findings are adopted herein, with elimination of some details, largely procedural matters. The supplements of the parties are primarily argument, but consideration has been given to such additional facts justified by the

record, as have been proposed, as distinguished from argument or conclusions. Paragraph numbering has of necessity been changed as required.

Findings of Fact

3. This proceeding is an investigation, pursuant to Sections 4(i), 4(j), 201, 202, 204, 205 and 403 of the Communications Act of 1934, as amended, into the lawfulness of the revision to paragraph 2.4.8(B) of AT&T Tariff F.C.C. No. 260. The subject revision eliminates the service interruption allowance which AT&T grants as a credit against AT&T's interstate private line service charges when interruptions occur on the system of an interconnected International Record Carrier (IRC) or the IRC's overseas foreign correspondent.

Procedural History

4. On October 26, 1976, AT&T filed with the Commission its Tariff Transmittal Letter No. 12627, wherein it proposed certain modifications to its Tariff F.C.C. No. 260. Among the proposed modifications was the deletion of Paragraph 2.4.8(B) which reads as follows:

> When private line services furnished by the Telephone Company (AT&T) are connected with overseas facilities of other carriers and interruptions to service are caused by a failure of the overseas facilities, credit will be allowed on the service furnished by the Telephone Company in accordance with (A) preceding for those interruptions for which the customer is entitled to an interruption allowance on the overseas facilities in accordance with the tariff of the carrier providing the overseas facilities.

This tariff revision would eliminate the current practice by AT&T of granting allowances or credits to customers of overseas leased channel service on the domestic landline segments of such service furnished by AT&T whenever an interruption of over 30 minutes' duration occurs on interconnected service segments provided by an IRC or the IRC's overseas correspondent(s). (AT&T Ex. No. 17, at 2–3; AT&T Ex. No. 18, at 12; Tr. 121, 162 and 238)

5. The revision was made because of AT&T's interpretation of the Commission's Memorandum Opinion and Order, in *Restrictions on Interconnection of Private Line Services*, released July 30, 1976 (60 FCC 2d 939), which required AT&T to eliminate or justify certain of the general interconnection regulations contained in its Tariff F.C.C. No. 260, which were found by the Commission to be unjustifiably discriminatory. Those regulations effectively restricted interconnection of AT&T private line services with communications systems provided by the customer, or an Other Common Carrier (OCC)[1] to

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[1] As defined in AT&T Tariff F.C.C. No. 260, "the term 'Other Common Carrier' denotes Specialized Common Carriers, Domestic and International Record Carriers and Domestic Satellite Carriers engaged in providing private line services as

premises where the non-carrier customer had a regular and continuing need to originate and terminate calls, and restricted connection of AT&T private line service to IRC computer switches to instances where the non-carrier customer required the connection to communicate over one or more overseas channels connected to the IRC switch.

6. Petitions requesting the Commission to reject the tariff revisions under AT&T Transmittal No. 12627 were filed by RCA American Communications, Inc., RCA Global Communications, Inc. (RCA Globcom), Western Union International, Inc. (WUI), MCI Telecommunications Corporation (MCI), the Computer and Business Equipment Manufacturers Association (CBEMA), and Control Data Corporation. Petitions requesting suspension and investigation of the revisions were filed by Shell Oil Company, ITT World Communications, Inc. (ITT Worldcom), RCA Globcom, WUI and MCI. In addition, Aeronautical Radio, Inc. filed comments addressed to the revisions.

7. In its Memorandum Opinion and Order herein (Designation Order), released February 23, 1977 (64 FCC 2d 528), the Commission denied the above-referenced Petitions to Reject. In addition, the Commission granted, in part, Petitions to Suspend the revision to paragraph 2.4.8(B) which eliminated the interruption allowance.[2] The Commission also instituted an investigation into the elimination of the interruption allowance pursuant to Sections 4(i), 4(j), 201, 202, 204, 205 and 403 of the Communications Act of 1934, as amended. (64 FCC 2d at 537) Without limiting the scope of the investigation, the Commission included two specific issues:

> (a) Whether such revision results in unlawful discrimination within the meaning of Section 202(a) of the Communications Act of 1934, as amended; and
>
> (b) Whether the elimination of the provision granting an interruption allowance to overseas customers is in the public interest.

8. Petitions for reconsideration were denied by the Commission by Order released August 9, 1977. (66 FCC 2d 3)

9. The following parties have intervened in this proceeding: AT&T, the Separated Trial Staff of the Common Carrier Bureau, ITT Worldcom, WUI, RCA Globcom, CBEMA, United Press International, Inc., the Associated Press, the American Newspaper Publishers Association, TRT Telecommunications Corporation (TRT) and the Secretary of Defense (DOD).

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such carriers may be authorized by the Federal Communications Commission to provide." (AT&T Tariff F.C.C. No. 260, para. 2.5.)

[2] Pursuant to Section 204 of the Communications Act of 1934, as amended, the Commission suspended the effective date of the revision to paragraph 2.4.8(B) for the full five month statutory period, *i.e.*, until July 19, 1977. (64 FCC 2d at 537). Subsequently, in response to requests made by the Staff of the Common Carrier Bureau, AT&T has further deferred the effective date. (AT&T Transmittal Nos. 12785, 12822 and 12859)

10. Pursuant to the Order Following Prehearing Conference, released April 26, 1977 (FCC 77M-789), AT&T distributed its direct case on June 1, 1977, which consisted of the Testimony of E. E. Carr and Paul E. Muench. Mr. Carr testified as to:

(a) The interruption allowance which AT&T grants on its own international private line services;

(b) The circumstances surrounding the service interruption allowance heretofore granted under paragraph 2.4.8(B) of AT&T Tariff F.C.C. No. 260;

(c) The effect of the revision of paragraph 2.4.8(B) on AT&T Tariff F.C.C. No. 260 private line services which are interconnected with IRC services; and

(d) The effect of the revision of paragraph 2.4.8(B) on AT&T Tariff F.C.C. No. 260 private line services which are interconnected with IRC services to Hawaii.

Mr. Muench testified as to the reasons why the tariff revisions filed under AT&T Transmittal No. 12627 included the elimination of the service interruption allowance heretofore provided under paragraph 2.4.8(B). The testimony of Mr. Carr was later identified and received into evidence as AT&T Exhibit No. 1 (Tr. 251); Mr. Muench's testimony was identified and received as AT&T Exhibit No. 2 (Tr. 364).[3]

11. The initial hearing herein was held on June 15–16, 1977, at which time Messrs. Carr and Muench were cross-examined. (Tr. 54–252 and 252–364) Following cross-examination, the parties, with the concurrence of the Presiding Judge, agreed that the scheduling of future hearing dates should be deferred pending a further hearing conference. (Tr. 364–365)

12. Prior to the date set for further hearing, the Commission, in a Memorandum Opinion and Order, released August 9, 1977 (FCC 77–567), denied Petitions by RCA Globcom, WUI and DOD which sought reconsideration of the Designation Order in this proceeding.[4] Specifically, the Commission found that the Designation Order had "appropriately denied" requests for rejection or suspension of the tariff revisions filed under Transmittal No. 12627, with the "limited exception" of the revision to paragraph 2.4.8(B). The Commission did, however, indicate that:

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[3] During the hearing held on June 16, 1977, WUI requested the Presiding Judge to strike Mr. Muench's testimony. WUI argued that the testimony was inadmissible because it allegedly constituted the giving of "[Mr. Muench's] opinion as to the legal effect and legal conclusions" to be derived from the Commission's Memorandum Opinion and Order, released July 30, 1976 (60 FCC 2d 939). (Tr. 254) CBEMA, DOD, TRT and the Common Carrier Bureau Trial Staff joined in this request. (Tr. 256, 258, 259 and 260) The Presiding Judge, however, denied the Motion on the grounds that the testimony was offered to show the basis for AT&T's decision to file the revision to paragraph 2.4.8(B) not as expert testimony on the legal effect of the Commission's July 30th Order. (Tr. 260)

[4] In addition, the Commission denied RCA Globcom's Motion for Expedited Paper Proceeding.

> We are concerned with WUI's statements, made for the first time here, that AT&T is refusing to respond to an outage call from an IRC unless and until there is a letter on file with AT&T from the IRC's customer designating the particular IRC as the agent of that customer. WUI states that this practice could result in prolonged circuit outages and delay in implementing new leases. These changes, the carrier states, also indicate AT&T personnel will no longer cooperatively work with IRC technicians on either end of AT&T provided circuits, again resulting in an unnecessary delay in restoration of service. These may be proper grounds for an enlargement of the issues in this proceeding but such requests initially should be directed to the Presiding Officer.

13. After the release of the foregoing Order, a Motion to Enlarge Issues was filed by WUI. In response, Statements in Support, an Opposition, and Comments on the Motion were filed by the parties to the proceeding. At issue was the question whether the changes in operating procedures announced by AT&T on March 9, 1977, relating to agency letter requirements and trouble reporting and cooperative testing for AT&T private line services which are interconnected with an IRC or OCC system, should be investigated and their lawfulness determined.

14. By a letter of September 1, 1977, to all parties to the proceeding, AT&T announced that, effective September 1, 1977, AT&T would no longer require that there be an agency letter on file with it before accepting trouble reports from an OCC or IRC, and that it would conduct cooperative testing between the appropriate telephone company serving test center and the OCC or IRC operating location, without requiring telephone company personnel to be dispatched to that operating location. As further stated in the letter, these changes restored AT&T's testing procedures in effect prior to the Commission's Order of July 30, 1976, except with respect to end-to-end testing at the rates which the Commission in its Designation Order permitted to go into effect. Subsequently, in a Memorandum Opinion and Order, released September 15, 1977 (FCC 77M-1598), the Presiding Judge denied WUI's Motion. The Judge found that the procedures objected to by WUI had been eliminated by AT&T, effective September 1, 1977, and that, as a result, the issues raised by WUI were "substantially, if not wholly" moot.

15. None of the parties submitted direct testimony on September 19, 1977. AT&T, however, filed a Motion which requested leave to file the testimony of Leslie M. Munford as a supplement to its direct case, which was granted by the Presiding Judge on September 26, 1977. (Tr. 397) Mr. Munford testified as to the AT&T procedures for testing interconnected private line services, including the September 1, 1977 changes in those procedures. At the hearing held on September 26, 1977, Mr. Munford was cross-examined and his direct testimony was identified and received into evidence as AT&T Exhibit No. 3. (Tr. 397) In addition, an AT&T internal memorandum implementing the September 1 changes was identified and received into evidence as AT&T Exhibit No. 4. (Tr. 409)

16. At the conclusion of the cross-examination of Mr. Munford, and after all parties had been given an opportunity to submit any further evidence relevant to the issues designated for investigation in this proceeding, the record was closed. (Tr. 409 and 411) By a Motion filed on October 7, 1977, AT&T, pursuant to permission granted at the September 26th hearing (Tr. 410), submitted copies of late-filed exhibits for the record comprising all interrogatories and answers in the proceeding. On October 17, 1977, by an Order of the Presiding Judge the exhibits were identified and received into evidence as AT&T Exhibit Nos. 5 through 22. (FCC 77M-1768)

Substantive Matters

Description of International Private Line Service

17. An international private line circuit consists of:

(a) A Terminal National Section from the customer's premises to the Terminal National Center;

(b) An International Link between the Terminal National Center and the Terminal National Center at the distant location; and

(c) A Terminal National Section between the Terminal National Center at the distant location and the customer's premises at that location. (AT&T Ex. No. 1, Att. A)

18. The International Link in such a circuit consists of:

(a) A National line between the Terminal National Center and the Terminal International Center;

(b) An International Line between the Terminal International Center and the Terminal International Center at the distant location; and

(c) A National Line from the Terminal International Center at the distant location to the Terminal National Center at that location.

The National Line and Terminal National Section are collectively referred to as the National Extension.

AT&T-Provided Private Line Service to International and Offshore Locations

19. Under AT&T Tariff F.C.C. No. 260, AT&T provides two types of private line service to international locations: voice-only private line service and audio program service. (AT&T Ex. No. 1, p. 2) AT&T also provides such service to Guam and the following United States offshore locations: Hawaii, Puerto Rico and the Virgin Islands. AT&T is, however, barred from providing private line record or voice/data services such as provided by IRCs, except:

(a) Private line record, simultaneous voice/record and alternate voice/record services between the United States mainland and Hawaii; and

(b) Private line alternate voice/data service specified in the TAT-4 decision (37 FCC 1151).[5]

20. AT&T private line services to international locations are provided in conjunction with foreign telecommunications administrations. AT&T provides the United States National Extension and one-half of the International Line. (AT&T Ex. No. 18, p. 6) When the service is ordered from AT&T, AT&T has overall responsibility and operational control over the entire service,[6] with the foreign administration assuming a subcontrol role for its National Extension. The actual construction, engineering and maintenance of the foreign National Extension is, however, conducted by the foreign administration. (Tr. 59) Further, if the customer orders the service from the foreign administration, the foreign administration assumes overall responsibility and control and AT&T has a sub-control role. (AT&T Ex. No. 18, p. 6)

21. AT&T and each foreign administration establish their own charges for their portions of the service. (AT&T Ex. No. 1, p. 3) There are generally four basic charges: AT&T's and the foreign administration's respective charges for the portion of the International Line each provides, and AT&T's and the foreign administration's respective charges for their National Line and Terminal National Section, *i.e.*, the National Extension.

22. AT&T private line service to Guam and the United States offshore points, *i.e.*, Hawaii, Puerto Rico and the Virgin Islands, differs from AT&T private line service to international locations in that the former is provided not with foreign administrations but other United States carriers: (a) in Hawaii—Hawaiian Telephone Company, (b) in Puerto Rico—All America Cables and Radio, (c) in the Virgin Islands—ITT Communications- Inc.—Virgin Islands, and (d) in Guam—RCA Global Communications, Inc. (AT&T Ex. No. 1 p. 14) AT&T and these carriers provide such private line service under a joint rate for the overseas portion of the services. Further, when such service is ordered from AT&T, AT&T has overall responsibility

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[5] Pursuant to the TAT-4 decision, *supra*, AT&T provides six government alternate voice/data and data private line services between the United States mainland and overseas points other than Hawaii. Two of those services are to the United Kingdom and four are to Bermuda, (AT&T Ex. No. 17, p. 2).

[6] Although the terms "overall responsibility" and "operational control" are not included in AT&T's tariffs, when used in connection with common carrier communications service, the term "overall responsibility" is defined by AT&T as the responsibility assumed by the carrier offering the service for the provision, design, maintenance and operation of the facilities and equipment necessary to furnish the end-to-end service. (AT&T Ex. No. 18, p. 3)

The term "operational control" is defined by AT&T as the control assumed by the carrier offering the service over the installation and operational testing, trouble isolation, and maintenance of the end-to-end service.

and control as set forth in paragraph 20, *supra*, with the other carrier having a sub-control role.[7] (AT&T Ex. No. 18, p. 5)

IRC-Provided Private Line Service to International and Offshore Locations

23. An IRC-provided private line service to international locations, Guam or the offshore locations consists of the same arrangement discussed in paragraphs 17 and 18, *supra*, except that all or a portion of the United States National Extension is provided by an interconnected domestic United States carrier. (Bell Ex. No. 1, p. 6) Further, because IRC domestic operations are limited to five "Gateway Cities,"[8] a "hinterland"[9] customer who desires international private line service from an IRC, must obtain the United States National Extension from a domestic private line carrier. (*Id.*) Although these domestic private line services are provided predominantly by AT&T (Tr. 141), customers can, at least in some geographic locations, obtain such service from other carriers. (Tr. 142).

24. The domestic private line service which constitutes the National Extension, when provided by AT&T to customers, is furnished under AT&T Tariff F.C.C. No. 260 and is connected to the IRC communications system at the IRC's operating center. (Tr. 204) The service from the IRC operating center to the customer's distant location is provided by the IRC and the appropriate foreign administration. (Tr. 162) The customer pays the charges specified in AT&T Tariff F.C.C. No. 260 for the National Extension, plus the appropriate charges of the IRC and the foreign administration for the International Line and the foreign National Extension. (Tr. 106)

The Service Interruption Allowance

25. In the case of an AT&T-provided private line service to international locations, Guam or the offshore locations—including Hawaii—customers receive interruption allowance credits toward AT&T's tariff charges whenever service over the International Link is interrupted beyond a specified minimum period, whether the interruption is due to a problem with the International Link or with the United States or foreign National Extension. (AT&T Ex. No. 1, p. 4 and Tr. 120–121) This interruption allowance practice is in accord

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[7] When the service is ordered from the carrier serving Guam, Hawaii, Puerto Rico or the Virgin Islands, the carrier has overall responsibility and control, with AT&T having a sub-control role. (AT&T Ex. No. 18, p. 5)

[8] The five presently authorized Gateway Cities are: New York, Miami, San Francisco, New Orleans and Washington, D.C. (AT&T Ex. No. 1, p. 6)

[9] Hinterland customers are customers located in those parts of the United States mainland outside of the five presently authorized Gateway Cities. (AT&T Ex. No. 1, p. 6)

with Part 4, Section 4.5, of C.C.I.T.T. Recommendation D.1 which concerns international private line service.[10] Section 4.5 states:

> "4.5 In principle an allowance should be given for all components of the through circuit between the customers' operating terminals regardless of where the interruption occurs, except as provided for in 4.7 following.[11] Where the interrupted circuit forms part of a network for private use, the allowance would apply only to the affected circuit.
>
> "Note: It is recognized that some Administrations are in a position to make allowances only in respect of failure in the intercontinental portion of leased circuit."[12]

26. In addition, pending the effective date of the tariff revision at issue in this proceeding, AT&T grants an interruption allowance against its Tarriff F.C.C. No. 260 charges when interruptions occur on an interconnected IRC system when advised by the IRC or requested to do so by the customer. (AT&T Ex. No. 1, pp. 1–5 and Tr. 404) This interruption allowance practice, which is in accord with Section 4.5 of C.C.I.T.T. REcommendation D.1, was instituted by a tariff revision filed on December 27, 1963 (AT&T Ex. No. 1, p. 7, corrected at Tr. 55), following an exchange of letters between RCA Communications, Inc. and AT&T, dated, respectively, November 18 and December 5, 1963 (AT&T Ex. No. 1, pp. 9–10 and Attachments B and C). Further, it appears that AT&T's reasons for filing the 1963 revision were because of requests by the IRCs which under the circumstances appeared warranted to meet customer requirements for service to and from overseas locations, and because the financial risk to AT&T was viewed as minimal.[13] (*Id.* at p. 10 and AT&T Transmittal No. 7784, filed December 27, 1963) Moreover, AT&T was apparently of the view that the 1963 revision would ameliorate IRC

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[10] C.C.I.T.T. ("International Telegraph and Telephone Consultative Committee") is a permanent organ of the International Telecommunication Union which itself is an agency of the United Nations established to provide a forum for developing standardized communications practices and procedures on a world-wide basis. (AT&T Ex. No. 1, p. 3)

[11] Section 4.7 is as follows: "No allowance shall be granted when an interruption (regardless of how long it lasts), or the non-operation of the leased circuit, is due to the negligence of the customer or to a fault in the apparatus or equipment belonging to him, and maintained and operated by him (or as in the case mentioned in 1.7 above in apparatus or equipment supplied, installed, or maintained at his expense)."

[12] AT&T provides an interruption allowance regardless of whether the foreign administration's interruption allowance practices are in accord with Part 4, Section 4.5 of C.C.I.T.T. Recommendation D.1. (Tr. 164).

[13] In 1963, as at present, IRC overseas private line services were provided in significant part over submarine cable facilities constructed, engineered and maintained by AT&T and appropriate foreign administrations. (AT&T Ex. No. 1, pp. 9–10 and Tr. 168) Further, the facilities between the IRC's operating center and the cable station were then, and still are, ordinarily provided to the IRC by AT&T. (Tr. 204–205) AT&T was thus of the view that its financial risk in filing the 1963 revision would be minimal. (AT&T Ex. No. 1, p. 10).

opposition to certain of AT&T's then pending international submarine cable applications.

AT&T's Reasons for the Revision to Paragraph 2.4.8(B) of Its Tariff F.C.C. No. 260

27. The tariff revision at issue herein was filed by AT&T as a result of its interpretation of the Commission's Memorandum Opinion and Order, released July 30, 1976 (60 FCC 2d 939). (Tr. 133 and 320) Although the July 30th Order contains no specific reference to the interruption allowance practices of AT&T (Tr. 274), AT&T concluded that the Order, in substance, mandated parity of treatment between customers who connect AT&T Tariff F.C.C. No. 260 services to IRC systems and customers who connect those services to systems provided by domestic OCCs. (AT&T Ex. No. 2, p. 3 corrected at Tr. 350–351 and 356) Accordingly, in conforming its tariff to its interpretation of the requirements of the July 30th Order, AT&T amended paragraph 2.4.8(B) of AT&T Tariff F.C.C. No. 260 to eliminate the service interruption allowance heretofore applicable when interruptions occur on interconnected IRC systems. (*Id.* at p. 6) In this regard, AT&T rejected the alternative of according interconnected domestic OCC customers the same interruption allowance which had heretofore been applicable to interconnected IRC customers. AT&T considered that the risks of according such an interruption allowance for domestic OCC customers was unacceptable in view of the uncertainty as to the reliability of the services presently offered by domestic OCCs, or which may be offered by them in the future. (Tr. 288-291)

28. In its interpretation of the July 30th Order, AT&T relied largely on paragraph 14 of that Order. (AT&T Ex. No. 2, pp. 2–3, Tr. 91 and 275–285) The subject paragraph lists certain exceptions to the prior tariff regulations which prohibited the connection of AT&T Tariff F.C.C. No. 260 private line services at an OCC premises. Specifically, those exceptions were:

> (a) the connection of AT&T private lines on the premises of an IRC when AT&T's customer desired to connect to ARX, AIRCON or PLC service; (b) the connection on the premises of an OCC when a Composite Date Service Vender leased Bell private line service; (c) the termination of certain private line voice services provided to the United States Air Force at RCA Globcom's premises and certain data transmission services provided to NASA on the premises of RCA Globcom and ITT Worldcom; (d) the termination of Series 6000 (audio) private line service and Series 7000 (video) private line service on the premises of other participating carriers; (e) the connection of AT&T lines on the premises of independent telephone companies and AT&T affiliated companies for through service to and from their respective service areas; and (f) the anomaly of the restrictions in issue as illustrated by comparing AT&T Tariff No. 266 and Bell System Operating Companies Tariff No. 3 with Tariff 260. (60 FCC 2d at 944)

The Commission found and concluded that this "different treatment is clearly 'in connection with a like communications service'" and that such discriminatory treatment had not been justified, nor had AT&T in fact even attempted to justify the discrimination. (60 FCC 2d at 945)

29. AT&T reasoned that because the Commission had found the foregoing exceptions, including those applicable to IRC customers, to be unlawfully discriminatory, it was necessary to revise its tariff to remove other instances of disparate treatment in the terms and conditions of interconnection applicable to customers of domestic OCCs and IRCs. (AT&T Ex. No. 2, p. 6) AT&T further concluded that only the initial four exceptions noted in paragraph 27 pertain to the interconnection of a service provided by AT&T with a domestic OCC or an IRC system. (Tr. 278) Thus, it is these four exceptions which AT&T believes constitute the basis for the Commission's finding of unlawfulness in the July 30th Order. AT&T has disregarded the latter two exceptions contained in paragraph 14 of that Order in making its interpretation, referring to these as "recitations of fact" of no consequential significance to the Order.[14] (Tr. 278–284)

Distinctions between IRCs and Domestic OCCs

30. With respect to the interruption allowance revision at issue in this proceeding, there are certain significant factors which may distinguish interconnection of an IRC-provided system from interconnection with a domestic OCC-provided system. (Tr. 285) Principally, those factors are:

(a) Considerations of international comity, *i.e.*, Part 4, Section 4.5 of C.C.I.T.T. Recommendation D.1, which suggest that an interruption allowance should be granted against the charges for the National Extension whenever interruptions occur on the International Link. AT&T has concluded, however, that notwithstanding this C.C.I.T.T. Recommendation, it has no feasible alternative but to eliminate the interruption allowance formerly granted under paragraph 2.4.8(B) of AT&T Tariff F.C.C. No. 260 in order to comply with the July 30th Order of the FCC. (Tr. 241)

(b) Furthermore, certain operational distinctions exist between international and domestic communications. (Tr. 273–274, 353–354 and para. 21 of the Designation Order) A user within the United States, who has a solely domestic communications requirement, has a choice of either using AT&T or another domestic carrier to obtain an end-to-end service. Such a user is not required to interconnect an AT&T service with a service provided by the other carrier. (Tr. 141–143, 188–190, 236–237 and 348–349) In contrast, a hinterland customer of an IRC overseas service must obtain domestic private line service from AT&T or some other domestic common carrier in order to access an IRC, which thereby distinguishes him from a domestic customer who is not under such legal constraint. (Tr. 189, 237 and 349) Further, once AT&T refuses to provide an interruption allowance against its charges when outages occur on the IRC system, the customer has to accept this situation as he has no other means of obtaining an end-to-end service and meeting his requirement for such an interruption allowance. (Tr. 190 and 349) On the other hand, IRCs give an interruption allowance against their charges for a service outage on the entire end-to-end service, irrespective of the fact that the outage may have occurred on an interconnected extension of the service.

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[14] With regard to the exception applicable to Bell System affiliates and independent telephone companies, the record reflects that these companies are joint providers of domestic telecommunications service. (Tr. 279) They do not compete with each other, or with AT&T. (Tr. 280) Thus, when AT&T provides a private line service to a customer, who has solely a domestic requirement, the service is provided in conjunction with Bell System affiliates or, in some cases, independent telephone companies. In such a case, AT&T grants an interruption allowance against its charges irrespective of whether the outage occurs on its facilities or those of the affiliated Bell System Company or the independent telephone company. (Tr. 279) Further, AT&T offers the entire end-to-end service to the customer under its Tariff F.C.C. No. 260, and it has overall responsibility and control when the service is ordered from AT&T. (Tr. 362–363).

31. In addition, in providing their service, IRCs utilize in large part:

(a) Entrance facilities provided by AT&T between the IRC operating center and the appropriate satellite earth station or cablehead (Tr. 204–205);

(b) International submarine cables provided, in many cases, by AT&T under an Indefeasible Right of Use or lease, or in which the IRCs have an ownership interest (Tr. 103 and 168);

(c) International satellite facilities provided by COMSAT (Tr. 97); and

(d) Satellite facilities between the United States mainland and Hawaii provided by the AT&T-GTE-COMSTAR System (Tr. 169).

The foregoing entrance facilities are constructed, engineered and maintained by AT&T; such submarine cables are constructed, engineered and maintained by AT&T and appropriate foreign administrations. (Tr. 168–169 and 204–205) Further, although international satellite facilities are constructed, engineered and maintained by COMSAT, AT&T participates in such matters through the Earth Station Owners Committee, or in the case of the above-referenced Hawaii satellite facilities, AT&T, COMSAT General and GTE Satellite Corporation jointly provide construction, engineering and maintenance.[15] (Tr. 97 and 169)

32. Notwithstanding the foregoing distinctions, AT&T Tariff

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[15] AT&T also provides facilities to domestic OCCs for use by those carriers in providing the services which they offer to their customers. (Tr. 272) Although such facilities are constructed, engineered and maintained by AT&T, the extent of AT&T's provision of such facilities is far more limited than the provision of facilities to IRCs. (Tr. 272 and 362–363)

Further, when AT&T provides facilities to a domestic OCC or to an IRC, AT&T grants an interruption allowance as a credit against its charges when interruptions occur on the AT&T facilities. (Tr. 308–309) AT&T does not, however, grant an interruption allowance when interruptions occur on other portions of a domestic OCC or IRC system.

Similarly, when AT&T provides transiting facilities to foreign administrations, or to carriers serving Guam or the United States offshore locations, AT&T grants an interruption allowance as a credit against its charges when interruptions occur on

F.C.C. No. 260 private line services which are connected to an IRC system are, with the exception of audio program services, identical to those connected to domestic OCC systems. (Tr. 303) Under such circumstances, AT&T was not willing to rely on the factors mentioned in paragraphs 30 through 31, *supra*, as a basis for distinguishing IRCs from domestic OCCs and continuing to grant an interruption allowance when the interruption occurred on the IRC system, absent some express Commission sanction for such a provision. (Tr. 292–293)

The Effect of the Revision to Paragraph 2.4.8(B)

33. Under the revision to paragraph 2.4.8(B) of AT&T Tariff F.C.C. No. 260, customers who connect Tariff No. 260 private line services with an IRC system are treated on a par with customers who connect Tariff F.C.C. No. 260 services with a domestic OCC system. (Tr. 296–297) If an interruption occurs on an AT&T Tariff F.C.C. No. 260 private line service which is connected to an IRC or domestic OCC system, an interruption allowance is granted against AT&T's charges for the Tariff F.C.C. No. 260 service. (Tr. 245) If an interruption occurs on the IRC or domestic OCC system, AT&T does not grant an interruption allowance against the charges for its Tariff F.C.C. No. 260 service. (Tr. 297) That is, if the revised paragraph 2.4.8(B) of AT&T Tariff F.C.C. No. 260 goes into effect, the IRC leased channel customer will not be entitled to an interruption allowance from AT&T against charges for the customer's AT&T service between the hinterland and the relevant IRC gateway when an outage occurs on the facility obtained by the IRC from AT&T between the relevant gateway and the relevant mainland earth station or cablehead, the portion of the overseas cable or satellite facility provided by the IRC, the portion of the overseas cable or satellite facility provided by the IRC's overseas correspondents, or any terrestrial facilities needed to terminate the service at the customer's overseas destination, whether transiting or within the terminal country. (AT&T Ex. No. 17, pp. 2–3, AT&T Ex. No. 18, p. 12 and Tr. 121, 162 and 238) Paragraph 2.4.8(B), however, makes no provision where an outage of service occurs and the location of the outage is unknown. (Tr. 245)

34. When AT&T private line services are provided to international locations, Guam or the offshore locations, in which case the National Extension and the International Line are provided under AT&T's Tariff F.C.C. No. 260, AT&T will grant an interruption

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the AT&T-provided facilities. (AT&T Ex. No. 21, pp. 6–7) AT&T does not, however, grant an interruption allowance when interruptions occur on other portions of the service being provided by such administrations or carriers.

allowance for its entire Tariff F.C.C. No. 260 service irrespective of the location of the fault.[16] Further, in the case of Hawaii, the customer receives such an interruption allowance regardless of whether the service is ordered under AT&T Tariff F.C.C. No. 260 or Hawaii Telephone Company Tariff F.C.C. No. 4. (AT&T Ex. No. 18, p. 15)

35. This interruption allowance provision gives such services, a feature which is not present when AT&T Tariff No. 260 services are connected to an IRC system, including IRC service to Hawaii[17] (AT&T Ex. No. 1, p. 14, Tr. 186 and 214), IRC service to Guam (AT&T Ex. No. 18. p. 16), and such IRC 50 or 56 kilobit secure voice service as may be authorized. (AT&T Ex. No. 17, p. 17) That is, in cases of AT&T Tariff F.C.C. No. 260 services which are interconnected to an IRC system, including but not limited to, interconnected service to Hawaii, interconnected service to Guam under RCA Globcom Tariff F.C.C. No. 58, and such interconnected IRC 50 or 56 kilobit secure voice service as may be authorized, the customer will not be entitled to interruption allowance against AT&T's charges when an outage occurs on other than AT&T's domestic Tariff F.C.C. No. 260 service, or in the case of interconnection service to Guam, when the outage occurs beyond the midpoint in the Pacific Ocean and Guam.

36. There are, however, certain technical or operational differences between an AT&T Tariff F.C.C. No. 260 private line service which is connected to an IRC system and an AT&T private line service to international locations, Guam or the offshore locations, including Hawaii. (AT&T Ex. No. 17, pp. 13–14 and Tr. 337–344) In the former situation, AT&T is offering a service from the customer's domestic premises to the IRC operating center (Tr. 340–341); AT&T does not have overall responsibility or operational control over the entire interconnected configuration. (AT&T Ex. No. 17, pp. 13–14 and Tr. 337–344) Accordingly, the Tariff F.C.C. No. 260 service is designed by AT&T as a stand-alone service meeting the transmission requirements for that service. It is not designed or offered as part of an overall interconnected service consisting of multiple segments. (Tr. 340)

37. On the other hand, when AT&T provides an international private line service in conjunction with a foreign administration, or an offshore or Guam private line service in conjunction with another United States carrier, AT&T is offering an entire service from the

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[16] Likewise in the case of the six alternate voice/data and data private line services provided as specified in the Commission's TAT-4 decision (see Paragraph 18, *supra*), AT&T will grant a customer of those services an interruption allowance against AT&T's entire Tariff F.C.C. No. 260 charges irrespective of the location of the fault.

[17] The record reflects that because users of private line services to Hawaii are fairly sophisticated communications customers, they would probably be aware of the subject difference in the interruption allowance practice. (Tr. 94)

hinterland customer's premises to the customer's distant premises. (Tr. 340–341) When the service is ordered from AT&T, it has overall responsibility and control. (AT&T Ex. No. 17, pp. 13–14 and Tr. 337–344) In such a case, the total end-to-end transmission requirements, from the hinterland customer's premises to the customer's distant premises, will be taken into account. Further, the transmission requirements for the end-to-end circuit are often different from those for the National Extension. (Tr. 341)

38. In the case of private line service provided by AT&T to foreign countries the percentage of the total number of interruptions to service reported through the period from April 1, 1977 through June 1, 1977 that were attributable to a failure of domestic land lines or equipment provided by AT&T was 24 percent (24%). (AT&T Ex. No. 22, p. 2) A study of AT&T-Long Lines 1976 billing records for three customers who had AT&T Tariff F.C.C. No. 260 services connected to an IRC system indicates that:

(a) Customer A had 17 interconnected services which produced annual revenues for AT&T for its Tariff No. 260 service of at least $30,549. The total amount of the interruption allowance credits granted in 1976 by AT&T was $137.

(b) Customer B had 24 interconnected services which produced annual revenues for AT&T for its Tariff No. 260 service of at least $83,976. No interruption credits were granted by AT&T in 1976.

(c) Customer C had 17 interconnected services which produced annual revenues for AT&T for its Tariff No. 260 service of $225,650. The total amount of the interruption credits granted in 1976 by AT&T was $218.

The study also indicated that all of the above-mentioned credits were for interruptions stemming from problems on the Tariff No. 260 service; no requests were found from the customers, or the IRCs, for credits due to interruptions on the IRC service.[18]

39. The available evidence also indicates that the revision to paragraph 2.4.8(B) of AT&T Tariff F.C.C. No. 260 will not adversely affect the quality or reliability of overseas private line service. (AT&T Ex. No. 3, p. 5) Furthermore, with the exception of the end-to-end testing procedures under paragraph 4.1.10 of AT&T Tariff F.C.C. No. 260, which the Commission in its Designation Order specifically declined to reject or suspend for investigation, the AT&T procedures for testing interconnected overseas private line service are the same as those in effect prior to the effective date of the tariff revisions filed under AT&T Transmittal No. 12627. Thus, the current testing procedures are not affected by the revision to paragraph 2.4.8(B) and should in no way result in a deterioration in service, or increase the number or duration of outages.

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[18] Further, of the 135 interconnected services provided by AT&T Long Lines and the IRCs to the DOD, there were only $331.37 in interruption allowance credits during the period May 1, 1976 through May 1, 1977. (AT&T Ex. No. 19, p.2, Att. I, Tr. 176, 181 and 186)

Additional Findings of Fact

40. The Department of Defense in 1976 utilized 27,449 Tariff No. 260 private line services (both domestic and international) which produced revenues of approximately $114,708,000. These services generated $65,615 in interruption allowance credits toward AT&T's charges but it is not known how many of the services were IRC/260 services.

41. Discontinuance of the interruption allowance credit will afford AT&T private line services a minimal advantage in certain of its services not involving IRCs. Further, where a single line carrier provides end-to-end service, removal of the interruption allowance credit will enhance to some degree the competitive positions of AT&T *vis-a-vis* the IRCs.

42. The monthly charges on an illustrative voice grade private line circuit from Chicago to Frankfurt, Germany are: (AT&T Ex. No. 1, p. 4)

		%
AT&T National Extension	**$ 604.00**	**5**
AT&T International Line	**4,585.00**	**40**
Foreign Administration National Extension and International Line	**6,319.00**	**55**
Total Monthly Charge	**$11,508.00**	**100**

Conclusions

43. AT&T has concluded that the present provision of Paragraph 2.4.8(B) of its Tariff F.C.C. No. 260, which extends an interruption credit to "overseas facilities of other carriers and interruptions to service are caused by a failure of the overseas facilities", in the light of the Commission's decision in AT&T, 60 FCC 2d 939, (sometimes referred to as the July 30th Order) is considered by the Commission as discriminatory because it does not extend that credit to facilities of Other Common Carriers (OCC), except the International Record Carriers (IRCs). It therefore seeks the cancellation of the provision rather than face a charge by OCCs (other than the IRCs) of discrimination and the necessity of extending such an allowance where OCC services are connected to AT&T facilities.

44. AT&T contends there are distinguishing factors between its interconnections with an IRC-provided system and a domestic OCC-provided system (AT&T Proposed Findings and Conclusions, Para. 21) but does not deem these sufficient to offset the thrust of the Commission decision cited "absent some express Commission sanction for such a provision".

45. The other parties, including the IRCs and the Trial Staff of the Common Carrier Bureau, argue that as the July 30, 1976 Order did not specifically mention the interruption credit here in issue, it

does not justify AT&T's position. The Trial Staff urges, moreover, that all statements in the Joint Proposed Findings which attempt to attribute to AT&T how it interpreted the Commission's July 30, 1976 Order, be rejected on the grounds it is irrelevant. This is essentially the same position taken by all parties except RCA Global Communications, Inc. and DOD, which argue there is sufficient reason to warrant different treatment by AT&T of the IRCs and domestic specialized carriers, and argue that the continuation of the existing tariff would not be discriminatory.

46. The contention of the Trial Staff that the motivation for the cancellation of the interruption credit is irrelevant, is overruled. On the other hand, it is not possible, in this proceeding, to make public interest findings as to the *continuance* of the provision *vis-a-vis* the domestic OCC carriers.

47. The interruption allowance was voluntarily instituted in 1963 by AT&T at the request of an IRC carrier. At that time, AT&T private line services overseas were mainly over submarine cable facilities that were constructed, engineered and maintained by AT&T and its foreign correspondents, and the facilities between the submarine cable stations were likely to be furnished by AT&T. It accordingly felt that in extending the interruption allowance to situations where the interruption was caused by non-AT&T portions, it would be exposed to minimal financial risk.

48. The record indicates that the number of outages and amounts of allowance credits in 1976 were minimal, and that the interruptions caused by AT&T equipment failures were only 24% during a two-month test in 1977.

49. Drastic changes in communications have occurred since 1963 when the interruption allowance was instituted. Thus, in addition to cables, satellite circuits have been introduced, entry of specialized carriers into the field have been provided. (*Specialized Common Carrier Services,*29 FCC 2d 870) and interconnection between carriers has been required. (*AT&T,*60 FCC 2d 939) Accordingly, the contention of the parties that the same circumstances now prevail as in 1963 must be rejected.

50. While the parties are correct that the July 30, 1976 Order did not deal specifically with the allowance here in question, the unmistakable mandate of that decision is that AT&T cannot treat IRCs any differently than the other OCCs. Thus, the removal of the existing difference is not only justified but required. The Trial Staff does not express any view as to such discrimination, but, merely it takes the view it is irrelevant. The removal of discrimination could be accomplished in either one of two ways, *i.e.,* elimination of the allowance as here proposed, or by extending it to include allowance to interruptions caused by the domestic OCCs in their portions of service. AT&T is unwilling to undertake the latter and the Commission has noted in its reconsideration Order herein (66 FCC 2d 3) that

as to the point of inter-connection with IRCs, "AT&T has no responsibility for service beyond that point." The same is obviously true of domestic OCCs.

51. It is clear that under the existing provision, the amount of allowances given are extremely small, that it is in accord with recommendations of the International Telegraph and Telephone Consultative Committee (C.C.I.T.T.), that it has worked well for a number of years, and that AT&T would be willing to continue it if it could be safeguarded from being required to extend the allowance into the field of domestic OCCs where there is no service interruption experience. Further, no IRC or their customers will be benefited by the proposed cancellation.

52. The first specific issue framed by the Commission is whether undue or unreasonable prejudice or disadvantages or prejudice or advantages to any person or class of persons will result under Section 202(a) of the Act. Assuming, therefore, the cancellation is in effect, no allowance would be made for interruptions occurring on any OCC's service, including IRCs, in other words, either domestic or international and the treatment would be the same.

53. Differences in treatment occur when AT&T provides overseas private line services in conjunction with a foreign administration or the carriers serving Guam or the United States offshore locations (including Hawaii) it makes the interruption allowance, whereas when provided in conjunction with IRCs, it does not. AT&T points out, however, as shown in the findings, in those instances it has responsibility and control over the entire service and meets total end-to-end requirements. In connection with the IRC services, in contrast, it provides only domestic service to the IRC operating center. This difference results from the inherent difference between an end-to-end international service and the pieced-out service involving multiple sources of service. Compare Paragraph 21 of the Designation Order. In view of the need to remove the present larger discrimination as to interruptions on domestic OCC services, and the small amount of interruptions involving allowances disclosed by this record, these differences cannot be considered undue or unreasonable preference of the AT&T customers or corresponding prejudice or disadvantage of IRC customers. In this connection, neither the IRCs nor the users participating herein, Department of Defense and press parties, have offered any evidence as to possible prejudice or disadvantage to them.

54. The second issue posed by the Commission is whether the elimination of the allowance is in the public interest. In view of the principles enunciated in the July 30, 1976 Memorandum Opinion and Order, it is clear that the present provision is discriminatory in being extended to IRCs and not to the OCCs. Therefore, its removal would be justified in the public interest.

Ultimate Findings

55. It is found that tariff provisions here in issue will not subject any person to undue or unreasonable prejudice or disadvantages or give any undue or unreasonable preference or advantage to any person or class of persons within the meaning of Section 202(a) of the Communications Act. It is also found that the proposed cancellation of Paragraph 2.4.8(B) of AT&T Tariff No. 260 will be in the public interest.

IT IS ORDERED That this proceeding IS TERMINATED.[19]

FEDERAL COMMUNICATIONS COMMISSION
FREDERICK W. DENNISTON, *Administrative Law Judge*

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[19] Exceptions may be filed and oral argument requested in accordance with 47 CFR § 1.276 and 1.277, after which the Commission shall issue its decision, 47 CFR 1.282.

Common Carrier, Computer II
Deregulation
Refund, Ratepayer
Subsidiary, Separate

Petitions for reconsideration of Order, 91 FCC 2d 578, approving the capitalization of AT&T's separate subsidiary to provide new customer premises equipment dismissed. Basic issues raised by petitioners do not warrant reversal of Order.
–*AT&T CO.*

FCC 83–424

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY	File No. ENF-83–7
Petitions for reconsideration of an order approving the supplemental capitalization of American Bell, Inc. to provide new customer premises equipment and an order permitting AT&T to capitalize a separate subsidiary to provide enhanced services pursuant to Section 64.702(d)(4) of the Commission's Rules	
Petition For Leave to Amortize Certain Deferred Credits	File No. ENF-83–26

MEMORANDUM OPINION AND ORDER

(Adopted: September 15, 1983; Released: September 20, 1983)

BY THE COMMISSION:

I. *INTRODUCTION*

A. *Background*

1. Pursuant to Computer II[1], on November 4, 1982, the Commission approved a capitalization plan filed by the American Telephone & Telegraph Co. (AT&T) to further capitalize American Bell, Inc.

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[1] Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 FCC 2d 384 (1980) (Final Decision), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* CCIA v. FCC, 693 F.2d 193 (D.C. Cir. 1982), *cert. denied*, 103 S.Ct. 2109 (1983).

(AmBell) to enable it to provide new customer premises equipment (CPE) on a detariffed basis as of January 1, 1983. *American Telephone & Telegraph Co.*, 91 FCC 2d 578 (1982) (*CPE Order*). This action followed an earlier Commission order which permitted AT&T to capitalize AmBell to offer enhanced services. See, *American Telephone & Telegraph Co.*, 90 FCC 2d 404 (1982) (*Enhanced Services Order*).

2. In the *CPE Order*, we permitted AT&T to transfer to AmBell on January 1, 1983, assets which were associated with the marketing of new CPE. These assets were valued at "adjusted net book value"[2] on an interim basis until a final valuation methodology was established in the *Implementation Proceeding*, CC Docket 81–893, FCC 83–181 (released June 21, 1983). In approving this asset transfer, we preempted inconsistent state action which could interfere with or delay the transfer of those assets by January 1, 1983. In addition, we approved the transfer of assets related to installation and maintenance of business CPE by June 1, 1984, subject to AT&T obtaining state public utility commission approval for such transfers.

3. The Commission also defined the way in which ratepayers would be reimbursed for those development and formation expenses funded through basic service rates. That reimbursement methodology was made applicable to the ratepayer reimbursement for enhanced services preoperational expenses as well. To effectuate a ratepayer reimbursement we required AT&T to reverse the accounting entries originally made when preoperational expenses were incurred and to book reimbursable amounts into a liability account on BOCs and Long Lines books pending ratemaking scrutiny.

4. Finally, we evaluated several aspects of AT&T's operational plans outlined in its CPE Capitalization Plan to determine whether they comported with Computer II's structural separation requirements. Although a thorough enunciation of AT&T's compliance with separation requirements was deferred to a later order, *see* Report and Order, FCC 83–123 (released April 13, 1983), some guidance to AT&T was provided to aid the Commission staff in its analysis of compliance-related issues.

B. *Summary*

5. Five parties filed petitions seeking reconsideration or clarification of the *CPE Order*. AT&T opposed each. These petitions raise three basic issues. First, the California Public Utility Commission (California) filed a petition seeking clarification or reconsideration of our decision to preempt inconsistent state action with respect to the transfer of specific assets from AT&T's regulated sectors to AmBell

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[2] "Adjusted net book value" equals original cost less accumulated depreciation, accumulated deferred income taxes due to accelerated depreciation and unamortized investment tax credits.

and of the interim valuation method utilized. We deny California's petition because California's action in approving the transfer of certain assets from Pacific Telephone & Telegraph Co. to AmBell was consistent with our *CPE Order*. In addition, we conclude that our action assigning an interim valuation of adjusted net book value to the transferred assets was proper. This matter will be formally resolved in our *Implementation Proceeding*, CC Docket 81–893, FCC 83–181 (released June 21, 1983).

6. Second, Rochester Telephone Co. (Rochester), United Telephone System, Inc. (UTS) and the United States Independent Telephone Association (USITA) filed petitions and GTE Service Corp. (GTE) filed comments (collectively referred to as the Independents) concerning the reimbursement methodology set forth in the Order. We deny these petitions because the mechanism we established in the *CPE Order* will effectively reimburse interstate ratepayers located in independent company territories, the parties who originally paid for preoperational expenses. In addition, we dismiss in this Order AT&T's Petition for Leave to Amortize Certain Deferred Credits. We conclude that AT&T should conduct the interstate reimbursement in the context of a rate filing, rather than simply applying the reimbursement amounts against interstate revenues during 1983.

7. Third, the North American Telephone Association (NATA) filed a petition seeking clarification or reconsideration with respect to whether the transfer of customer information from the Bell Operating Companies (BOCs) to AmBell violates Computer II's structural separation requirements. We deny NATA's petition for reconsideration, but we do clarify that Computer II's structural separation requirements are not violated if information is retained by employees who transfer to AmBell prior to January 1, 1983 which contains non-customer specific data in statistical form relating to marketing of products and services AmBell plans to introduce. In addition, Computer II is not violated if a customer requests in writing that its own customer proprietary information be transferred only to AmBell.

II. *DISCUSSION*

A. *Preemption Issue*

8. California petitions for clarification or reconsideration of our *CPE Order* on two subissues.[3] First, California states that the Order was insufficiently explicit as to what actions it could take without running afoul of Computer II. Specifically, California questions our

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[3] On December 23, 1982, AT&T filed a motion for an extension of time within which to file an opposition to California's petition. We grant AT&T's motion because California failed to serve a copy of its petition on AT&T as required by section 1.106(f) of the Commission's Rules (47 C.F.R. § 1.106(f)).

preemption of inconsistent state actions with respect to the transfer of marketing assets as of January 1, 1983 to AmBell. On December 15, 1982, California adopted an order, after conducting an investigation, which approved the transfer of assets from Pacific Telephone & Telegraph Co. to AmBell related to the provision of new CPE. *See Application of Pacific Telephone & Telegraph Co.*, Decision No. 82–12–067 (Calif. P.U.C., December 15, 1982) (California Decision). The assets approved for transfer were the same assets we approved for transfer in the *CPE Order*.

9. In the context of that application proceeding, a hearing was held before a state administrative law judge, who took testimony from interested parties and Pacific Telephone & Telegraph Co. witnesses. In the Decision approving transfer, the California Commission evaluated the testimony to determine whether the assets in question were necessary to support the provision of basic communications services.[4] The California Commission concluded that the assets in question, largely leasehold improvements in Bell PhoneCenter stores, were not necessary to provide regulated services and that the transfer should therefore be approved.

10. California in its petition for clarification or reconsideration requests that we clarify what actions a state may take consistent with the *CPE Order*. In evaluating the propriety of transferring assets and eventually approving such transfer, California acted consistent with the *CPE Order*. Furthermore, California's action in conducting a further proceeding to determine the value of the transferred assets for purposes of state ratemaking is not inconsistent with our Order.[5]

11. The second subissue California raises is that it was improper for us to use adjusted net book value as the interim value for the transferred assets. California believes that we should use market value instead. AT&T asserts that this Commission acted properly in valuing assets at adjusted net book value on an interim basis and argued that California's market value approach is improper. California states that the case of *Democratic Central Committee of D.C. v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786

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[4] The question of how the assets would be valued for ratemaking purposes was left to another state hearing. California Decision at 2.

[5] In addition to an Opposition, AT&T filed a Motion to Dismiss both California's petition and reply. AT&T argues in its motion to dismiss California's petition that California's request for reconsideration is moot since California complied with our Order. California requested reconsideration on the subissue of the extent of our preemption of inconsistent state action only if we found that California's Decision approving the asset transfer violated our Order. California's petition is a valid request for clarification of a Commission Order. In addition, California's petition went beyond a simple valid request for clarification. In these circumstances, AT&T's mootness argument simply is inapplicable. We therefore deny AT&T's motion to dismiss California's petition.

(D.C. Cir. 1973), *cert. denied*, 415 U.S. 935 (1974), supports its argument. Nothing in *Democratic Central Committee* stands for the proposition that a public utility may not be required to employ an interim valuation method when transferring assets out of regulated service. The court in that case was primarily concerned with ensuring that ratepayers received the benefit of any value of property transferred out of regulated service. Here, we have explicitly stated that state ratemakers may use some alternative valuation methodology for state ratemaking purposes under the particular facts of that case. Thus, our decision employing an interim valuation method is not inconsistent with that case.

12. The reason an interim valuation methodology was utilized here, rather than adopting a final valuation, was so that a resolution of the valuation question would not delay the deregulation of CPE. Further, by deferring the particular valuation at hand, we are in a position to resolve all matters relating to asset valuation at one time. This is consistent with the decision reached as to asset valuation in the *Enhanced Services Order*. 90 FCC 2d at 418. The value of the assets to be transferred out of regulated service in the context of Computer II implementation is the subject of another, ongoing proceeding, the *Implementation Proceeding*. This interim action is entirely consistent with the language and purposes of our valuation authority contained in section 213 of the Communications Act of 1934, 47 U.S.C. §213. California's petition for reconsideration of the interim valuation methodology is therefore denied.

B. *Reimbursement Issue*

13. The Independents request that we reconsider that portion of the *CPE Order* which established how AT&T was to reimburse ratepayers for the preoperational expenses they funded through higher rates. Enhanced services preoperational expenses were the subject of our *Enhanced Services Order*. AT&T petitioned for reconsideration of the that Order solely on the reimbursement issue.[6] Because the issues raised by a ratepayer reimbursement were similar for both CPE and enhanced services preoperational expenses, we entertained AT&T's petition for partial reconsideration of the *Enhanced Services Order* together with the ratepayer reimbursement issues raised in the CPE Capitalization Plan proceeding.

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[6] In the *Enhanced Services Order* we required AT&T to reimburse the BOCs and Long Lines for the amount of enhanced services preoperational expenses funded by those entities. We also required AT&T to increase the cross-bar plant depreciation reserves (account 171.221 cross-bar) of the BOCs and Long Lines by the full amount of reported enhanced services preoperational expenses incurred by regulated affiliates. The increased reserve would have resulted in a reduced ratebase, thereby leading to reduced tariff rates paid by ratepayers. *Enhanced Services Order*, 90 FCC 2d at 425. That approach was reconsidered for reasons set forth in the *CPE Order*, 91 FCC 2d at 599–600.

14. AT&T proposed to use the same reimbursement procedure in its petition for partial reconsideration of the *Enhanced Services Order* and in its CPE Capitalization Plan. AT&T proposed to reimburse the BOCs and Long Lines for the amount of preoperational expenses they funded either directly or through the license contract. This reimbursement would be accomplished by reversing the accounting entries originally made when these expenses were incurred. Thereafter, each of the BOCs would present the reimbursement amounts applicable to their respective state ratemaking jurisdictions for ratemaking treatment. Similarly, Long Lines would present the interstate portion of these expenses to this Commission in the next ratemaking or rate equalization proceeding following the reimbursement to Long Lines. No party that filed comments in either the enhanced services or CPE proceedings stated an opinion concerning the proper way to accomplish a ratepayer reimbursement.

15. In the *CPE Order* we accepted AT&T's proposed accounting treatment of the reimbursement amounts. Thus, we required AT&T to reimburse the BOCs and Long Lines for the expense amounts they funded by reversing the accounting entries originally made when these expenses were incurred. Nevertheless, we concluded that this method by itself was insufficient to ensure that ratepayers actually received the benefit of the reimbursement. Therefore, we required AT&T to place undisputed reimburseable expenses in a liability account, account 174, "Other deferred credits," until ratemaking treatment had been afforded those amounts. During the next state ratemaking proceedings, AT&T was required to identify the total amount of preoperational expenses applicable to a jurisdiction, including amounts which were disputed,[7] for the state ratemaker's decision. Therefore, we left it to a state's discretion whether the amounts AT&T presented in a particular state should be increased or decreased. The total interstate expenses were required to be entered into Long Lines account 174. Then, AT&T was required to reduce its revenue requirement in the next interstate ratemaking or rate equalization proceeding by the amount of these interstate-allocated amounts contained in account 174.

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[7] AT&T argued that ratepayers did not actually bear all of the preoperational expenses which were reported as funded by the BOCs in the report it filed pursuant to paragraph 105 of the *Reconsideration Order*. 84 FCC 2d at 85–86. AT&T argued that (1) some of these preoperational expenses were specifically excluded by state ratemakers, (2) some of these expenses were excluded because the state ratemaker placed a cap on the amount of license contract expenses which could be included in the revenue requirement, and (3) some were not included in the revenue requirement during a ratemaking test year. We directed AT&T to file reports with the Chief of the Common Carrier Bureau demonstrating how AT&T allocated expenses among the state and interstate jurisdictions and to identify the amounts of expenses it claimed were excluded by state ratemakers. *CPE Order*, 91 FCC 2d at 602.

16. By employing this mechanism, a more effective ratepayer reimbursement could be achieved than the method outlined in the *Enhanced Services Order*. This mechanism assures that roughly the same ratepayers who funded these expenses would receive the reimbursement and in approximately the same amounts as they funded. In addition, by requiring AT&T to book reimburseable amounts into accounts 174, we required AT&T to correctly state the liability it owed to ratepayers on BOC and Long Lines books.

17. Rochester, UTS and USITA petitioned for reconsideration of the *CPE Order* seeking reversal of the Commission's requirement that the BOCs and Long Lines book undisputed reimbursement amounts into accounts 174 to reflect the liability to ratepayers on their books. GTE filed "Comments" which supported the position taken by the Independents.[8]

18. Rochester states that it is entitled to a portion of the reimbursement AT&T made to the BOCs and Long Lines because it was deprived of its proper share of interstate toll revenues when AT&T recovered interstate toll revenues in the settlements process by including preoperational expenses in the interstate revenue requirement. In order to increase its share of the revenue pool, Rochester proposes that the amounts AT&T books into BOC and Long Lines accounts 526, "Other Operating Revenues" should be considered "below-the-line" and allocated "to other than toll operations." Rochester Petition at 4. The effect of that proposal, Rochester states, would be to increase its and other independent companies' share of the interstate revenue pool and to reimburse them for their share of the toll revenues they were deprived of when AT&T included preoperational expenses in the settlements process.

19. USITA states that independent telephone companies were deprived of approximately $26 million in toll revenues because AT&T included preoperational expenses in the settlements process. USITA states that the amounts owed to independent telephone companies and their customers should be reimbursed immediately to those companies. The amount owing should be calculated, according to USITA, by substituting "the Bell companies increased rate of return for that used for settlement purposes during the period covered by the reimbursement." USITA Petition at 3. USITA further urges that, if we were to require an immediate reimbursement to

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[8] AT&T filed a motion to strike GTE's "Comments" on the ground that it was an unauthorized pleading under section 1.45(c) of the Commission's rules (47 C.F.R. §1.106(c)) and good cause was not shown to support our accepting it. Although GTE should have filed a petition for reconsideration within the time specified in section 1.106 of our Rules (47 C.F.R. §1.106), we will accept and consider GTE's comments as a late-filed petition for reconsideration. This reconsideration proceeding has not been materially delayed by the acceptance of GTE's pleading and no party has been harmed by our consideration of GTE's Comments. AT&T's reply comments contained in its motion to strike, as well as USITA's Opposition to AT&T's Motion to Strike, have also been considered.

independent companies, revenues would be increased, reducing the need for exchange rate increases and, thus, obviating the need to enter those reimbursements on independent company books of account to await ratemaking treatment.

20. UTS argues that it is adversely affected by the requirement that the BOCs and Long Lines book ratepayer reimbursement amounts into accounts 174. Instead, UTS asks this Commission to require AT&T to "flow the reimbursed preoperational expenses through Uniform System of Account Number 674 (Licence Contract Expense) without an entry to Account Number 174." UTS Petition at 2. In support of its petition, UTS first argues that, because AT&T has not earned its authorized rate of return, ratepayers are not entitled to any reimbursement. Therefore, UTS argues, after the reversal of the accounting entries AT&T originally made when preoperational expenses were included in revenue requirements, no further accounting entry is appropriate because the BOCs and Long Lines owe ratepayers nothing. Second, UTS posits that the *CPE Order* unilaterally preempted UTS' contractual rights with the Bell System. UTS states that the Order prevented the normal operation of the jurisdictional separations and settlements process which would have been adhered to had we not required the BOCs and Long Lines to book undisputed reimburseable amounts into accounts 174. Thus, UTS concludes, we did not accomplish our goal of reimbursing ratepayers, which includes ratepayers of independent companies, in the same proportion as they originally paid.

21. In a collective reply to these three petitions, AT&T states that independent ratepayers will receive their appropriate share of reimbursement monies once ratemakers determine the proper disposition of the funds contained in accounts 174. AT&T objects to the independent companies' wish for immediate reimbursement since this would "leave the full amount of the reimbursement as a liability in Account 174 and also require AT&T to reimburse a portion of that amount to the independents," resulting in AT&T reimbursing more than 100 percent of the amount it is required to reimburse. In addition, AT&T argues that, since it booked reimbursement amounts to accounts 174 at the end of 1982, it would be disruptive to change the accounting at this time.

22. GTE generally supports the position enunciated by the other Independents. GTE argues that the Commission required the BOCs and Long Lines to book into accounts 174 the "amount of the refund *net of Independent company settlements*." GTE Petition at 3 (emphasis in original). GTE argues that AT&T's reimbursement approach does not comply with our Order. GTE and USITA state that an immediate reimbursement to independent telephone companies is necessary because, after the divestiture of the Bell Operating

Companies pursuant to the Consent decree entered into between AT&T and the Department of Justice[9] and consequent changes to the settlements process, independents may not receive the refund to which they are entitled.

23. AT&T replied to GTE's petition in its motion to strike GTE's unauthorized pleading. In that reply, AT&T states that independent telephone companies are not entitled to a reimbursement of funds booked to accounts 174 because ratepayers funded those amounts, not the independents. If, on the other hand, it is determined that ratepayers did not fund the amounts booked to account 174, then independents will receive a share of the reimbursement through the settlements process. AT&T also points out that interstate ratepayers in both BOC and independent company territories will benefit from a ratepayer reimbursement by Long Lines in any event.

24. We reject the request that independent telephone companies receive direct reimbursement for a portion of the preoperational expenses we found to be reimbursable to ratepayers. We have two concerns about inclusion of these expenses in the interstate revenue requirement through the jurisdictional separations and settlements process. First, these expenses may have caused higher interstate rates, paid by subscribers in areas served by the independents and BOCs. Second, these expenses may have lowered the earned interstate rate of return for the independents and BOCs, possibly increasing their intrastate revenue requirements and, perhaps, leading to higher intrastate toll and local rates or lower earnings.[10] The most direct way to reverse the first type of harm is by requiring AT&T to reduce its interstate revenue requirement by the amount of the interstate-allocated portion of these preoperational expenses. Lower interstate toll rates will benefit subscribers in areas served by the independents and BOCs. The magnitude of the second concern is difficult to discern and would vary amoung exchange telephone companies and states in ways that can be approximated only through costly and time-consuming accounting analysis. Furthermore, it is not clear that, once the amount of reimbursement from the interstate-allocated expenses to each exchange carrier was estimated, the amounts would be large enough to have any discernible impact on local and intrastate toll rates. Nor is it clear that the earnings of exchange telephone companies should be increased by these amounts.[11] Therefore, we choose the more direct mechanism

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[9] United States v. American Telephone & Telegraph Co, 552 F. Supp. 131 (D.C.C. 1982), *aff'd sub nom.* Maryland v. United States, 103 S. Ct. 1240 (1983).

[10] Theoretically, the independent telephone companies may have been deprived of a portion of intrastate toll revenues if some preoperational expenses were allocated to intrastate toll operations in the jurisdictional separations and settlements process. We do not address this situation since the Independents do not raise any facts necessary to resolve it and because this matter is more appropriately left to state ratemakers for resolution.

for reimbursement of the interstate-allocated expenses against AT&T's interstate revenue requirement.

25. Furthermore, we find unpersuasive USITA's and GTE's argument that an immediate reimbursement to independent telephone companies is required because of the future changes to the jurisdictional separations and settlements process which may occur as a result of the Department of Justice Consent Decree. This argument ignores that we have effectively dealt with this potential problem by requiring AT&T to immediately book all intrastate rembursable amounts into BOC accounts 174 and to book all interstate amounts into Long Lines account 174. Thus, any future change in the separations and settlements process would have a minimal impact, if any, on this reimbursement. In addition, any changes to the separations and settlements process should be dealt with once those changes occur.[12]

26. UTS raises an additional argument as to why entries into accounts 174 are inappropriate. UTS argues that, because AT&T has not earned its allowed rate of return in the years in which these expenses were included in the settlements process, a ratepayer reimbursement is not warranted. Thus, UTS concludes, there is no need to place these amounts into accounts 174. We reject this argument. AT&T was permitted to charge rates designed to earn its allowed rate of return. We have never permitted AT&T to retroactively increase its rates if its realized rate of return happens to be lower than permitted. Therefore, whether its realized rate of return is equal to its allowed rate is simply irrelevant to this inquiry. We deny the Independents' petitions for reconsideration.

27. We also note that, after the pleading cycle for the reconsideration petitions was completed, AT&T filed a Petition for Leave to Amortize Certain Deferred Credits. That Petition requests that we

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[11] We also reject GTE's suggestion that, because it did not earn its allowed rate of return in the years in which these expenses were included in the jurisdictional separations and settlements process, it should not be required to reimburse its ratepayers. Because independent ratepayers will receive the reimbursement to which they are entitled, we also conclude that UTS contractual rights to the fruits of the settlements process have not been infringed.

USITA in its Opposition to AT&T's Motion to Strike, argues that the Commission's reimbursement mechanism will lead to the wrong ratepayers being reimbursed since future ratepayers will not always be identical to past ratepayers who funded these preoperational expenses. This argument was addressed by us in the *CPE Order* at para. 74. There, we concluded that an approximation of the class of ratepayers to be reimbursed was the only feasible method of identifying ratepayers who paid these expenses.

[12] Because we have concluded that independent telephone companies will not be directly reimbursed we reject the alternative methods suggested by the Independents to conduct this reimbursement. In particular, we reject GTE's interpretation of the *CPE Order* that we intended to require AT&T to enter into accounts 174 reimbursable amounts net of independent company settlements. AT&T has correctly interpreted our Order.

alter the reimbursement mechanism we established for interstate amounts booked to Long Lines' account 174. The *CPE Order* required AT&T to reimburse interstate ratepayers for all interstate-allocated amounts in the next rate proceeding following the entry of the amounts into account 174.[13] AT&T's Petition requests approval to amortize the interstate reimbursement amounts against interstate revenues during the remainder of 1983. In effect, AT&T asks us not to require any ratepayer reimbursement for interstate amounts.

28. In support of its Petition AT&T argues that during 1983 it will earn far below the rate of return of 12.75 percent which we permitted AT&T to earn on interstate operations. *See American Telephone and Telegraph Co.*, 86 FCC 2d 221 (1981). AT&T states that it should not have to file a rate case simply to disperse these reimbursement amounts. AT&T argues that it would be entitled to a rate increase if it filed tariffs during 1983 by an amount much larger than the reimbursement expenses in Account 174.[14] AT&T asks that we permit it to simply apply the reimbursement amounts against interstate revenues during 1983, which it states would effectively reduce the 1983 revenue requirement without the necessity of conducting a rate proceeding. AT&T notes that if we followed its approach, independents would receive a share of those reimbursement amounts during 1983 through the separations and settlements process.[15]

29. We deny AT&T's Petition. First, we must point out that AT&T has never denied that interstate ratepayers did not pay for pre-operational expenses in rates for regulated service. Second, AT&T's argument that it should not have to reimburse ratepayers because it is not currently earning its allowed rate of return is misplaced. When AT&T's current rates were set, AT&T was provided the opportunity to earn its allowed rate of return. It was in the revenue requirements for current rates that preoperational expenses were improperly included in the first place. It is a longstanding principle of utility regulation that if the actual rate of return does not attain that goal, the utility is not entitled to make up the

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[13] The term "rate proceeding" used in the *CPE Order* was intended to also include tariff filings.

[14] AT&T states that, at present, approximately $156.3 million has been entered in account 174 because of CPE and enhanced services expenses and $39.4 million was entered for cellular services expenses. Cellular preoperational expenses were required to be reimbursed in the same manner as CPE and enhanced services expenses in the Cellular Capitalization Order. *American Telephone and Telegraph*, FCC 83-126 (released April 15, 1983), *reconsideration pending*.

[15] GTE, USITA, Centel and Rochester have filed statements concurring with AT&T's Petition to Amortize. On May 9, 1983 USITA filed a Motion to Hold its Petition for Reconsideration of the *CPE Order* in Abeyance until the Commission reached a decision with respect to AT&T's Petition to Amortize. Given that we are here denying the relief requested in AT&T's Petition, USITA's Petition is now moot and is therefore denied. California filed comments in opposition to AT&T's Petition to which AT&T filed a Reply.

shortfall. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). Rather, the utility is permitted to file new tariffs seeking increased future rates based on future projections of revenues and revenue requirements. It is for this reason that we required AT&T to conduct the present reimbursement in the context of a rate filing so that future rates based on projected revenues and revenue requirements could account for the reimbursement amounts by reducing the rates from what they would have been had the reimbursement amounts not been payable to ratepayers.

30. We anticipate that AT&T will file adjusted tariff rates for most or all interstate services in October 1983 as a consequence of the access charge proceeding, *MTS and WATS Market Structure, Third Report and Order*, CC Docket 78–72, Phase I, FCC 82–579 (released Feb. 28, 1983), *reconsideration*, FCC 83–356 (released August 22, 1983), *appeal filed*, No. 83–1225 (D.C. Cir., March 1, 1983). Since the adjusted interstate rates should affect the vast majority of interstate ratepayers, these rates would be an appropriate mechanism for returning these reimbursement amounts to ratepayers. AT&T should file rates for its services, using the amounts in account 174 to reduce the revenue requirement for each service, separately identifying the reimbursement amounts. For example, if AT&T sets its rates to recover a 12.75 percent rate of return, it would be required to reduce those rates to reflect the ratepayer reimbursement. Within fifteen days of this Order AT&T shall file with the Chief, Common Carrier Bureau its plan as to how it will allocate the reimbursement over different classes of interstate services in the next tariff filing. The reimbursement should be concluded within one year, and AT&T may file new tariffs to terminate the reduction in rates occasioned by the reimbursement after the initial rates have been in effect for one year.

C. *Structural Separation Compliance Issue*

31. NATA petitioned for reconsideration or clarification of the *CPE Order* concerning whether a transfer of marketing information to AmBell violated Computer II's structural separation requirements. NATA alleges that AT&T conducted a massive data collection effort prior to January 1, 1983, directing the BOCs to collect detailed customer information and to transfer such information to AmBell. In support of its allegation, NATA cites an internal AT&T document entitled, "1982 Restructuring Guidelines." AT&T denies that a massive collection of marketing data by the BOCs has been conducted or that such information has been transferred to AmBell. AT&T states that the collection of data to which NATA refers is predominantly a "financial and personnel skills inventory" designed to aid the BOCs to adapt to the Computer II environment. AT&T recognizes that its employees are prohibited from transferring customer proprietary information to AmBell in violation of Comput-

er II. In addition, AT&T argues that NATA's petition is premature since the Commission stated that we would address compliance issues in a forthcoming order.

32. In permitting AT&T to provide new CPE as of January 1, 1983, we required, among other things, that the separate subsidiary established to provide new CPE must conduct its own marketing efforts apart from other Bell organizations. 47 C.F.R. § 64.702(d)(1). That rule prohibits an AT&T affiliate from disclosing customer proprietary information to AmBell unless it is also disclosed on the same terms and conditions to those members of the public that the customer selects. We again recently addressed that joint marketing prohibition in *American Telephone & Telegraph Co., Report and Order*, FCC 83–123 (released April 13, 1983), where we discussed AT&T's plans to prevent the unauthorized transfer of customer proprietary information from the BOCs to AmBell. *See id.*, Appendix A, para. 38. There we stated that no violation of Computer II would occur if an employee transferred to AmBell prior to January 1, 1983, retains copies of studies related to the marketing of products to be introduced by AmBell as long as the marketing information which is transferred is provided in statistical form rather than on a customer-specific basis. If, however, individual customer proprietary information is transferred to AmBell, that information must also be provided to the public if the customer to whom the information relates permits.

33. AT&T's 1982 Restructuring Guidelines have been reviewed. Language was discovered in those guidelines which apparently would lead to a violation of Computer II if implemented. *Id.* AT&T filed with the Commission, however, a copy of its *Transition Guidelines* given to the BOCs in late 1982, which supersedes the language of the Restructuring Guidelines to make any transfer of customer information comply with Computer II. Because we do not find a violation of Computer II in the specific plans as proposed in AT&T's *Transition Guidelines*, we deny NATA's request to reconsider our *CPE Order* on those grounds. The staff has been directed to monitor AT&T's compliance with structural separation requirements. Any party who becomes aware of facts upon which a violation of Computer II may be proven is invited to file a complaint with this Commission seeking to correct such violation.

III. *ORDERING CLAUSES*

34. THEREFORE, pursuant to Sections 4(i) and 4(j) of the Communications Act of 1934, as amended, (47 U.S.C. §§ 154(i) and (j)), the Petitions for Reconsideration and/or Clarification filed by the California Public Utility Commission and the North American Telephone Association and the Petitions for Reconsideration filed by United Telephone Systems, Inc., the United States Independent Telephone Association and Rochester Telephone Co. ARE DENIED.

35. IT IS FURTHER ORDERED That American Telephone & Telegraph Co.'s Motion to Strike GTE Service Corp.'s pleading IS DENIED.

36. IT IS FURTHER ORDERED That American Telephone & Telegraph Co.'s Motion for Extension of Time in which to file an Opposition to the California Public Utility Commission's Motion for Reconsideration and/or Clarification IS GRANTED.

37. IT IS FURTHER ORDERED That American Telephone & Telegraph Co.'s Motion to Dismiss the California Public Utility Commission's Motion for Reconsideration and/or Clarification and Supplemental Motion for Reconsideration and/or Clarification IS DENIED.

38. IT IS FURTHER ORDERED That American Telephone & Telegraph Co.'s Petition for Leave to Amortize Certain Deferred Credits IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Criteria

Applicant's shift to moderate integration preference is outweighed by its substantial demerit for violation of Rule 1.65 and lack of candor in not reporting for 18 months the resignation of its former general manager and president.
–Bay Television, Inc.
BC Docket No. 81–788

FCC 83R–70

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BAY TELEVISION, INC. St. Petersburg, Florida	BC Docket No. 81–788 File No. BPCT-790130LI
HOME TV, INCORPORATED St. Petersburg, Florida	BC Docket No. 81–789 File No. BPCT-790803KF
For Construction Permit	

Appearances

Kathryn R. Schmeltzer and *Martin R. Leader* for Bay Television, Inc.; *Vincent A. Pepper*, *James J. McGillan*, and *Peter Gutmann* for Home TV, Incorporated.

DECISION

(Adopted: September 7, 1983; Released: September 16, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL NOT PARTICIPATING.

1. Two applicants are competing to establish a new UHF television station in St. Petersburg, Florida. In his Initial Decision Administrative Law Judge Frysiak concluded that even though Home TV, Inc. must be awarded a slight demerit for negligence in timely reporting changes in its application, Home's other comparative advantages were sufficient to overcome this slight disadvantage. FCC 83D-12, released February 22, 1983, paras. 103, 115. The competing applicant, Bay Television filed exceptions on March 24, 1983, urging that Home should have been disqualified or awarded a

substantial demerit for filing misleading reports about significant changes. Home's reply on April 25, 1982 supported the Initial Decision. Oral argument was held June 17, 1983. For the reasons developed below, we have concluded that Home TV should have received a substantial demerit for its deliberate, repeated, and prolonged failure to report significant decisional changes in its application contrary to the requirements of Section 1.65 of the Commission's Rules and complete candor. Home's slight to moderate integration advantage is not sufficient to overcome its serious failure to accurately report. See paras. 7, 10, and 18 below.

2. *Background*: The procedural history of this case, and the basic facts are set out in the Initial Decision, and need not be repeated here. *See I.D.*, paras. 1–92. After reviewing the record in the light of the briefs and arguments, the Board has concluded that: (a) Home TV will be assessed a substantial comparative demerit for repeated violations of Section 1.65 because of its 18-month delay in reporting the correct facts concerning the resignation of its general manager, paras. 3–10 below, (b) the comparative applicants are equal under the diversification factors, paras. 13–15, and (c) Home TV is entitled to only a slight to moderate preference for participation of ownership in management, paras. 16–17.

3. *Section 1.65; Lack of Candor*. Generally, an applicant is required to amend its pending application within 30 days whenever the information previously furnished is no longer substantially accurate and complete in all significant respects, or whenever there has been a substantial change as to any other matter which may be of decisional significance. 47 CFR 1.65; *Nuance Corp.*, 85 FCC 2d 412, 415–16 (Rev. Bd. 1981). Section 1.65 was enacted by the Commission nearly two decades ago to insure that broadcast applicants file timely reports about decisional changes in the information set out in their original applications. *Reporting of Changed Circumstances*, 29 Fed. Reg. 15, 516, 3 RR 2d 1623 (1964). In this report the Commission also recognized that the rule would contribute to administrative fairness in comparative cases by keeping applicants informed about the true nature of their competition throughout the hearing process. 3 RR 2d at 1624–1625. Section 1.65 requires the reporting only of material which may be of "decisional significance." *WEBR, Inc.* v. *FCC*, 420 F.2d 158, 168 (D.C. Cir. 1969). *In* comparative cases the rule helps to guard against "trial by ambush," or impermissible "upgrading" which are inconsistent with fair administrative practice in comparative cases. *See Allied Broadcasting Co.* v. *FCC*, 435 F.2d 68, 70 n.9 (D.C. Cir. 1970); *Birmingham Family Television, Inc.*, 91 FCC 2d 348, 52 RR 2d 525 (1982). Here there is no dispute that the information which was not reported concerned a crucial comparative factor.

4. Home TV proposed in its original application filed in 1979 that its then president, Todd A. Spoeri, would be the station's full-

time general manager and would direct station operations. *I.D.*, paras. 67, 94. By letter dated August 12, 1980, Spoeri resigned as president of Home TV and as general manager of the proposed station and stated that he would shortly be moving from St. Petersburg to New England in order to take a position with Storer Broadcasting Company. Spoeri's resignation was presented to a special joint meeting of Home TV's stockholders and board of directors, held on September 3, 1980, at which time a new president was elected. *I.D.*, paras. 76–77, 101; Bay Exh. 8. Neither the letter of resignation, nor Spoeri's withdrawal as General Manager was reported to the Commission within the 30 days required by Section 1.65.

5. Some six months later, on February 6, 1981, Home TV filed an amendment to its application which, although reporting that Andre White had replaced Spoeri as president, maintained that Spoeri would work "full time" at the station. *I.D.*, para. 77, n. 11, para. 88. When the competing applicant objected to the amendment of Home's application to protect itself against later comparative upgrading, in a February 24, 1981 reply Home represented that "Spoeri intends to move back to St. Petersburg and work full-time as general manager of the station upon grant of a permit." *I.D.*, paras. 79, 89. Again Spoeri's August 1980 letter of resignation as General Manager was not disclosed. Finally, a year later in connection with its February 12, 1982 response to still another pleading from the competing applicant, Home TV submitted an affidavit dated February 4, 1982, in which Spoeri unequivocally stated that he would not return to St. Petersburg to be employed at the station nor serve as officer or director of the applicant. *I.D.*, paras. 80, 92. Even at this late date the August 1980 resignation letter was not disclosed, and Spoeri's affidavit can be construed as a further attempt to conceal the August 1980 resignation. See *I.D.*, para 80. The confusion was further compounded by Spoeri's conflicting testimony at the hearing. *See I.D.*, paras. 81–83; note 1 below.

6. The Initial Decision concluded that although Home TV "did not deliberately misrepresent Mr. Spoeri's status," a slight comparative demerit would be assessed because "Home was negligent in timely reporting changes in its application . . . in connection with Mr. Spoeri's activities." *I.D.*, para. 103. In its exceptions, Bay argues that Home TV should have at least been assessed a substantial comparative demerit for lacking candor in its representations to the Commission concerning Spoeri's employment status. Bay Br. at 3–6, 8–18. Home TV replies that the record evidence supports only the Initial Decision's assessment of a slight demerit for its "technical breach" of duty to timely report "all aspects of its ownership and management plans" and for its failure "to exercise due care in making statements under oath" regarding Spoeri's employment. Home TV Reply at 4–5.

7. We agree with Bay that a substantial demerit should have been assessed. First, a factor of "substantial importance" is the extent to which an applicant's owners will participate full time in station management. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1965). Here, Spoeri was Home TV's originally proposed general manager—a critical policy-making role. *Ibid.* His resignation from that position was therefore of potential decisional significance. It should have been reported by Home TV within 30 days of its receipt of Spoeri's August 12, 1980 letter of resignation. Second, Home TV delayed reporting this critical change until February 12, 1982, some *18 months* after its occurrence. Moreover, during that period Home in several different pleadings submitted information about Spoeri which misled the Commission and the competing applicant about Spoeri's role, para. 5 above. Third, Home also did not report Spoeri's resignation as president until February 6, 1981, a delay of six months.

8. Home TV's vice-president, Herman W. Goldner, testified that he understood Spoeri's August 12, 1980 letter to reflect a true "resignation" (Tr. 298, 321–22) but, because he considered Spoeri's experience and background to be "essential basically to the management and success of the company," he asked Spoeri in December 1980, and again in January 1981, to reconsider his decision to resign. Tr. 300–02. Spoeri indicated that he would consider Goldner's request but would need a definite employment offer before he could commit himself to work for the applicant. Home TV never made such an offer to Spoeri. Goldner continued to hope that Spoeri would change his mind and once again become the full-time general manager of the proposed station, but, in January 1982, when Home TV's plans for ownership participation in management had to be finalized in order to respond to Bay's interrogatories, he accepted as definite Spoeri's resignation from that role. Tr. 233–38, 241, 246–47, 250–53, 258–59, 298–302, 321–22, 340. Only then did Home TV report this resignation to the Commission but even that belated report did not disclose the August 1980 resignation. Thus, Home TV deliberately failed to report Spoeri's resignation.

9. Although the Board need not disturb the ALJ's conclusion that Home TV did not intentionally misrepresent Spoeri's role with the applicant (*I.D.* para. 100), we nevertheless find that Home TV's 18-month delay in reporting Spoeri's resignation as general manager, and 6 month delay with respect to his resignation as president, were deliberate acts on its part and a serious matter that strikes at the heart of the Commission's reporting and candor requirements. The delay in reporting was substantial and the matter of Spoeri's resignation relates directly to the integration criterion for evaluating comparative applicants, which the Commission considers to be a comparative factor of substantial importance. Home TV's reasons for not reporting are also inadequate. That Goldner may have subjec-

tively believed that Spoeri's resignation was not final and that Goldner hoped that Spoeri might yet be persuaded to change his mind and return to his former position at the station are poor excuses for misinforming the Commission as to the status of this important principal.

10. We assume *arguendo* that Mr. Goldner's belief was an honest one and that in his conversations with Mr. Spoeri after August 1980, the latter had agreed to "keep the door" open on reconsidering his decision.[1] Nevertheless, the Commission and competing applicant were not informed of Mr. Goldner's expectations and as a result were kept in the dark for 18 months regarding a significant change in Home's management structure. This omission was not a momentary lapse nor was it inadvertent. Rather, it was a deliberate decision not to disclose a decisional fact to the Commission. While Home TV's reporting failure appears to have been largely motivated by poor judgment on Goldner's part, based on our review of the record, we conclude that a significant comparative sanction is warranted for this deliberate withholding of Spoeri's resignation for 18 months. *See Broadcast Communications, Inc.*, 53 RR 2d 805, 813–14 (Rev. Bd. 1983). Moreover, Home's repeated failure to make full disclosure of Spoeri's resignation as general manager, its filing of several incomplete and misleading statements, and its apparent motive for not reporting the matter accurately to the Commission because of its hope of luring Spoeri back to St. Petersburg as its general manager are all elements in the totality of conduct which is tantamount to a violation of the basic requirement of candor. *Cf. United Broadcasting of Florida (WFAB)*, 55 FCC 2d 832, 838 (1975), *recon. denied*, 60 FCC 2d 816 (1976). For these reasons, and because Home was not forthcoming on a matter of potential decisional significance for a protracted period of time, a substantial comparative demerit will be assessed. *See also Coastal Bend Family Television, Inc.*, FCC 83R-46, June 24, 1983; *Shoblom Broadcasting Co.*, 53 RR2d 1203 (Rev. Bd. 1983); *Valley FM Radio, supra*, 53RR 2d at 1197.

11. In addition to the Spoeri resignation matter previously discussed, exception has also been taken, Bay Br. 6–8, to the Initial Decision's conclusion that Spoeri did not misrepresent his employment relationship with Storer when he described as "honorary" his position as vice-president and general manager of the northest region of Storer's Cable Communications Division. *I.D.*, paras. 93–99. Spoeri's role at Storer is relevant to the diversification criterion of

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[1] Spoeri's conflicting testimony on this subject at the May 19, 1982 hearing session was explained by the fact that his recollection was refreshed prior to his afternoon testimony by his looking at telephone records. (*I.D.*, para. 101, n. 13) While the ALJ erred in not permitting the other parties to inspect the documents used to refresh Spoeri's memory, *see Federal Rules of Evidence, Rule 612*, Bay TV's exceptions, Br. 14–15, on this point are not decisional because of the conclusion which we reach below, Para. 18, and can be dismissed as moot, thus eliminating the need for a remand. *Valley FM Radio*, 53 RR 2d 1195, para. 1 (Rev. Bd. 1983).

the standard comparative issue because Storer owns cable and broadcast interests in Florida. On the record before us the "honorary" description was inaccurate, if not deliberately misleading. In fact, Mr. Spoeri testified that when appearing before local communities on cable franchise matters on behalf of Storer he has represented himself as Vice President, Tr. 193, and that "if it is important to a contractual consideration, for instance, the specific representation that I make is that I am an officer of the corporation, that I am obligating to whatever . . . business matter that we are dealing with." Tr. 195. Mr. Spoeri is an officer in a total of 40–50 Storer subsidiaries in the northeast region, which does not include Florida, Tr. 177, 218–219, although he presently resides at Storer's headquarters in Florida.

12. In an attempt to clarify this matter, the Board at oral argument requested that Home TV supplement the record with an official public document showing Spoeri's relationship with Storer. Tr. 386–390, 395. Unfortunately, the applicants, in a series of letters and other pleadings, went beyond our request for submission of any clarifying material in the public domain of which we could take official notice (Tr. 387–8) and filed documents which could not be admitted without an opportunity for further cross-examination. Accordingly, we will dismiss these pleadings as unauthorized. Thus a question remains as to which, if any, Storer media interests should be attributed to Home. Regardless of whether Spoeri's title of vice-president at Storer is "honorary," the key question that would have to be resolved is whether Spoeri's role at Storer is a "significant managerial position in . . . other media." *Policy Statement, supra*, 1 FCC 2d at 394 n.5. The record as developed thus far does not satisfactorily answer this question and a remand would ordinarily be needed to resolve the point, which might include the adduction of relevant evidence from Storer officials. Our review of the record has convinced us that this matter is not of decisional significance because of our ultimate conclusion. We therefore can dismiss Bay's exception as moot and do not remand this issue for further evidence. See note 1 above.

13. *Diversification of Control of the Mass Media*. Bay has controlling media interests in three television stations located in Pittsburgh, Pennsylvania; Columbus, Ohio; and Baltimore, Maryland, respectively. *I.D.*, para. 105. In addition, a 4.8% stockholder of Commercial Radio Institute, which owns 39.1% of Bay, is a 50% partner in the licensee of Chattanooga, Tennessee television station. Bay Amendment filed March 22, 1983; *I.D.*, para. 5. By comparison, an 8.33% owner of Home TV is general manager of an AM broadcast station at Tampa, Florida; and another 8.33% owner has an attributable 49% ownership interest in an FM broadcast permittee at Havana, Florida. *I.D.*, paras. 107, 109. The ALJ weighed these

interests and concluded that Home TV should be awarded a moderate diversification preference over Bay. *I.D.*, para. 110.

14. In its exceptions, Bay argues that it should be preferred because its media interests are in distant communities whereas Home TV has "extensive local media interests." Bay Br. at 25–26. In its reply, Home TV urges affirmance of the ALJ's conclusion because Bay has a greater degree of control over its other media interests and those interests are major market television stations compared to Bay's minor radio interests. Home TV Reply at 12–13.

15. The Board has considered the applicants' media interests and concludes that they are essentially equal under the diversification criterion. Accordingly, neither will be awarded a preference. To begin with, neither applicant has attributable interests in the proposed community of license, a factor given the most weight by the *Policy Statement, supra*, 1 FCC 2d at 394–5. While Bay has the larger number of attributable interests, those interests are considerably distant from the community of license. On the other hand, Home TV's interests, while fewer and of lesser degree, are in the state of Florida and its radio interest in Tampa is especially important because that community is enveloped by the applicant's Grade A contour. *Hearing Designation Order*, 46 Fed. Reg. 58736, published December 3, 1981, para. 14. Interests in the proposed service area are more significant than more distant interests. *Policy Statement, supra*, 1 FCC 2d at 394–95. Nevertheless, that Tampa media interest is counter-balanced by Bay TV's greater "degree of interest" - control - in its stations (*I.D.* at 394) and its connection with television which is a more significant media interest because it is the service being applied for in this case. *See Cleveland Television Corp.*, 91 FCC 2d 1129, 1139 (Rev. Bd. 1982), *review denied*, FCC 83–235, released May 18, 1983. In sum, we do not believe that grant of either application will meaningfully advance the Commission's diversification policies and objectives and therefore conclude that no preference should be given. *See Greater Wichita Telecasting, Inc.*, 90 FCC 2d 1046, 1048–50 (Rev. Bd. 1982). In reaching this conclusion, we have considered and rejected Bay's claim that former Home TV stockholder J. Eugene Danzey's interest in Station WRXB(AM) in St. Petersburg should also be attributed to that applicant, for reasons given in the *I.D.* at para. 106. *See WHW Enterprises, Inc.*, 89 FCC 2d 799, 812–14 (Rev. Bd. 1982). Because the record is unsatisfactory with regard to Spoeri's managerial position with Storer's Cable Communication Division, we have not attributed Storer's Florida cable interests to Home for diversification purposes. See para. 12 above.

16. *Ownership Participation in Management*. Home TV was credited with full-time integration of 23% compared to 53.8% part-time (20 hours per week) integration for Bay, and Home was therefore awarded a moderate preference. *I.D.*, paras. 111–114. Bay objects to the award of any integration credit to Home TV because it

asserts that the latter's three participating owners—Andre White, Herman Goldner, and Jeffrey Rahall—will only be consultants at the station. Home TV responds that each will work full time in a managerial role.

17. We agree with Home TV that its integration proposal should be credited. The applicant has adequately demonstrated that each of its challenged principals will have meaningful managerial roles. *See* Home Exh. 3. White is proposed as the director of community relations for the proposed station as well as chief executive officer and president. His testimony shows that he is a local resident familiar with the community relations needs and ethnic composition of the area (Tr. 287–88) and that his functions will include making "sure that the programming is geared to what we have proposed to do" (Tr. 289). Although Bay has argued with some force that Home TV may attempt to replace White as president with Spoeri, if he can be persuaded to leave Storer, this is irrelevant to White's integration credit because Home has adequately shown that White will serve full time in a managerial capacity as community relations director. Goldner will be the director of news and business services as well as senior executive. His roles in charge of news and business are recognized by the *Policy Statement* as particularly significant, 1 FCC 2d at 395, and are therefore creditable in the absence of evidence, not present here, that he will not fill them. Rahall will work as comptroller and be responsible for supervising the books of account and determining the propriety of expenditures made on behalf of Home TV. This role also appears to be managerial with regard to finance and Home TV did not adduce any contrary evidence. *See* Tr. 291–95; *New Continental Broadcasting Co.*, 88 FCC 2d 830, 839 (Rev. Bd. 1981), *recon. denied*, 89 FCC 2d 631, *remanded on other grounds*, FCC 83–159, released April 13, 1983. Therefore, we agree with the ALJ's conclusion that Home TV should receive 23% full-time credit and Bay should receive 53.8% part-time credit. However, because Bay will have a majority of its ownership participating in station management, albeit on a part-time basis, we conclude that Home TV's moderate preference awarded by the Initial Decision should be slightly reduced. *Cf. Nuance Corp., supra*, 85 FCC 2d at 419 (26.6% full-time credit vs. 0% merits moderate preference). Thus, we credit Home TV with a slight to moderate preference over Bay.

18. *Summation.* We have followed the ALJ's lead and not resolved the misrepresentation issue against Home TV. However, we do award a substantial demerit because the ALJ's findings reveal a clear pattern of failure to report the resignation of the proposed general manager in violation of Section 1.65 and the basic requirement of candor. *Millard Orrick*, 89 FCC 2d 571 (1982). Neither applicant has received a preference for diversification. Home's substantial demerit, which relates directly to its ownership participation, outweighs the lesser preference it received based on that

factor, para. 17 above. Accurate reporting and full disclosure are fundamental to the Commission's regulatory functions, and essential to fair comparative proceedings; thus we cannot find that Home is the best comparative applicant. A grant of the Bay application will best serve the public interest, convenience, and necessity.

19. ACCORDINGLY, IT IS ORDERED, That the letters filed June 27, 1983, by Bay Television, Inc. and July 19, 1983 by Home TV, Incorporated, and related filings, ARE DISMISSED; and

20. IT IS FURTHER ORDERED, That the petitions for leave to amend filed March 22 and July 21, 1983 by Bay Television, Inc. ARE GRANTED, and the amendments ARE ACCEPTED; and that the motion to reopen the record for limited purposes filed March 10, 1983 by Home TV, Incorporated IS GRANTED, the amendment IS ACCEPTED, and the record IS CLOSED; and

21. IT IS FURTHER ORDERED, That the application of Bay Television, Inc. (File No. BPCT-790130LI) for a new commercial television station to operate on Channel 38 at St. Petersburg, Florida IS GRANTED, and the application of Home TV, Incorporated (File No. BPCT-790803KF) IS DENIED

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

FCC 83D–12

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
BAY TELEVISION, INC. St. Petersburg, Florida	BC Docket No. 81–788 File No. BPCT-790130LI
HOME TV, INCORPORATED St. Petersburg, Florida	BC Docket No. 81–789 File No. BPCT-790803KF
For Construction Permit	

Appearances

Kathryn R. Schmeltzer and *Martin R. Leader* on behalf of Bay Television, Inc.; *James J. McGillan* and *Vincent A. Pepper* on behalf of Home TV, Incorporated; *Christopher C. Smallwood* on behalf of Oak Television of Tampa Bay, Inc.; and *Brian P. Kilbane* on behalf of Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

(Issued: February 14, 1983; Released: February 22, 1983)

Preliminary Statement

1. This proceeding was designated for hearing by *Order* released November 24, 1981 (46 Fed. Reg. 58736, published December 3, 1981), and involves the two mutually-exclusive applications of Bay Television, Inc. (Bay) and Home TV, Incorporated (Home) for a construction permit to build and operate a new UHF television station on channel 38 at St. Petersburg, Florida.[1] The issues, as originally specified, were as follows:

1. To determine with respect to Bay Television, Inc.:
   (a) whether it has the additional $691,140 available to finance the construction and operation expenses;
   (b) whether the proposal of the applicant is consistent with the minimum

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[1] The application of Oak Television of Tampa Bay, Inc. was dismissed pursuant to a joint settlement agreement. *Memorandum Opinion and Order* FCC 82M-1996, released June 24, 1982. Since Oak's application has been dismissed, no further reference will be made to it.

mileage separation requirements of Section 73.610 and if not, whether circumstances exist which would warrant a waiver of that rule;

(c) whether, in light of the evidence adduced pursuant to (a) and (b), applicant is financially and technically qualified.

2. To determine with respect to Home TV, Inc.:

(a) whether Home has the additional $904,259 available to finance the construction and operation expenses;

(b) whether, in light of Mr. Gilder's interest in WTMP(AM), Tampa, Florida, grant of Home TV, Inc.'s application would be in the public interest;

(c) whether, in light of the evidence adduced pursuant to (a) and (b), applicant is financially and legally qualified.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. By *Memorandum Opinion and Order* FCC 82M-0993, released March 30, 1982, the presiding judge granted a motion for summary decision and resolved in Home's favor both the financial and one-to-one market issues. By *Memorandum Opinion and Order* FCC 82M-1057, released April 5, 1982, Bay's motion for summary decision on the minimum mileage separation issue was granted. Bay also received a favorable resolution of the limited financial issued specified against it. *See Memorandum Opinion and Order* FCC 82M-1303, released April 22, 1982.

3. By *Memorandum Opinion and Order* FCC 82M-1115, released April 8, 1982, the presiding judge enlarged the issues against Home to include the following:

> To determine whether Todd A. Spoeri has misrepresented his employment relationships with Home TV, Inc. and/or Storer Broadcasting, Inc. to the Commission, and/or lacked candor, and in light of the evidence adduced, whether Home TV, Inc. has the requisite qualifications to be a Commission licensee.

4. A prehearing conference was held on January 28, 1982, and hearing sessions were held on May 18 and 19, 1982 in Washington, D.C. The record was closed on May 19, 1982. Proposed findings of fact and conclusions of law were filed by the parties on August 23, 1982 and reply findings were filed on September 7, 1982.

Findings of Fact

The Applicants

Bay Television, Inc.

5. Bay is a Florida corporation formed for the purpose of engaging in television broadcasting in St. Petersburg, Florida. The corporation has 5,000 shares of common stock authorized at $1.00 par value, one vote per share. Five hundred nineteen shares have

been issued and none subscribed. The officers, directors and stockholders of Bay are as follows (Bay Ex. 1, p. 1):

Name and Residence	*Office*	*Director*	*No. and % of Shares Held*
Julian S. Smith Baltimore, Md.	President	Yes	259 (49.9%)
Frederick M. Himes Towson, Md.	Executive Vice President, Sec./Treas.	Yes	20 (3.9%)
Robert L. Simmons Timonium, Md.	Vice President/ Sales	Yes	–
Raymond E. Hoop Potomac, Md.	–	–	10 (2.0%)
Daniel D. Moore Baltimore, Md.	–	–	10 (2.0%)
Jules R. Clemens Potomac, Md.	–	–	10 (2.0%)
B. Stanley Resnick Baltimore, Md.	–	–	10 (2.0%)
Commercial Radio Institute, Inc. Baltimore, Md.	–	–	200 (39.1%)

6. All stockholders, officers and directors of the corporation are United States citizens. Julian S. Smith will vote the shares of Commercial Radio Institute, Inc. (CRI). Bay Ex. 1, p. 2.

7. CRI evolved from the purchase of an electronics school, the Commercial Radio Institute, Baltimore, Maryland. In 1952 CRI purchased the assets of the Commercial Radio Institute which had been operating successfully since 1920. From 1952 until the closing of its educational courses in 1977, the Commercial Radio Institute prepared students for the technical aspects of radio and television broadcasting. The Institute had the distinction of being the oldest communications school in the Maryland area and one of the oldest in the United States. Julian S. Smith, the president and director of CRI, as well as a major stockholder of CRI, was president of the Institute during this period and taught electronics courses in television and radar at the evening school. Until the fall of 1979, the Institute remained open for the purpose of actively maintaining records for the graduated student body. The records are currently maintained by the Maryland State Department of Education. In addition, until the fall of 1979, the Institute continued to offer counseling and job referral and placement services. Bay Ex. 1, p. 2.

8. In 1958 CRI filed an application for a construction permit to operate an FM broadcast station on channel 226, Baltimore, Maryland. CRI received a grant in 1959 and station WFMM(FM) commenced operation on channel 226 in February 1960. CRI

operated the station for 14 years until its sale in 1974 to Nationwide Communications, Inc. Bay Ex. 1, pp. 2–3.

9. The capital from the sale of station WFMM(FM) to Nationwide Communications, Inc. was used to pursue an application for a new UHF television station in Pittsburgh, Pennsylvania. Construction was delayed for several years because CRI became involved in a mutually-exclusive proceeding. At present, CRI, a corporation composed of 21 shareholders, is the licensee of station WPTT-TV, Pittsburgh, Pennsylvania, which commenced operation on September 30, 1978. The Pittsburgh station currently operates 24 hours a day with an ERP of five million watts (DA) under the supervision of Frederick M. Himes, Jr., executive vice president, secretary, treasurer, director and 23.3% stockholder of CRI. Bay Ex. 1, p. 3; Tr. 42.

10. In addition, CRI owns 200 shares or 36.7% of Chesapeake Television, Inc., the licensee of television station WBFF(TV), Baltimore, Maryland. WBFF(TV) started telecasting on Easter Sunday, 1971, with a radiated power of 1.59 million watts. CRI is also the permittee of channel 28, Columbus, Ohio. Bay Ex. 1, p. 3; Tr. 48.

11. The principal shareholders of Bay and CRI are Julian S. Smith and Frederick M. Himes, Jr. Mr. Smith, president, director and 21.8% shareholder of CRI, is president, director and 47.1% owner of Chesapeake Television, Inc. Bay Ex. 1, p. 3; Tr. 105.[2]

12. Frederick M. Himes, Jr., the executive vice president, secretary, treasurer, director and 23.3% shareholder of CRI, is executive vice president, director and 3.6% owner of Chesapeake Television, Inc. Bay Ex. 1, p. 3; Tr. 78–79, 82–83.

13. Robert L. Simmons, a director and 10.1% shareholder in CRI, is vice president/sales of Chesapeake Television, Inc. and also of CRI. He is a 5.4% stockholder of Chesapeake Television, Inc. Bay Ex. 1, p. 4; Tr. 39, 42.

14. William R. Hoos, vice president and 5.0% shareholder of CRI, owns 140 shares or .0019% of Baltimore Radio Show, Inc., the licensee of stations WFBR and WBKZ(FM), Baltimore, Maryland. Bay Ex. 1, p. 4.

15. H. D. G. Smith, Julian Smith's brother, owns 0.6% of CRI and 50 shares or .00069% of Baltimore Radio Show, Inc. Of the remaining shareholders of CRI, only the following have other broadcast interests:

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[2] Following the hearing, Bay by amendment has reported the following present interests in Chesapeake Television, Inc. as a result of stock options exercised by Julian S. Smith and Frederick M. Himes, Jr.: Julian S. Smith - 47.5%; Frederick M. Himes, Jr. - 8.2%; Raymond E. Hoop - 1.6%; Robert L. Simmons - 4.9%.

Name and Residence	*Interests in CRI*	*Other Broadcast Interests*
Raymond E. Hoop Potomac, Md.	2.3%	1.8% owner and director of Chesapeake Television, Inc., WBFF (TV)
Augustine A. Levero Baltimore, Md.	Director 0.9%	Promotion and Marketing Manager, WBFF (TV)
B. Stanley Resnick Baltimore, Md.	2.3%	1.8% owner of Chesapeake Television, Inc., WBFF (TV)

Bay Ex. 1, p. 4.

16. Bay's application reflects that the applicant will institute a scholarship program for minorities after the first 18 months of operation. At WPTT(TV), Pittsburgh, Pennsylvania, and WBFF(TV), Baltimore, Maryland, in which the principals of Bay have interests, such minority scholarship programs have been successfully implemented. At WPTT(TV), the minority student scholarship program was initiated in connection with the Community College of Allegheny County (Boyce Campus), Pennsylvania. The station provided a scholarship to one minority student entering the Community College in September 1979. Two scholarships were offered in 1980 and again in 1981. Two scholarships have also been awarded to minority students during the 1981–82 school year. The minority student scholarship program at WBFF(TV) was started in 1977 and has been carried on each year under the direction of the public affairs director. In 1977 and 1978, two students attended the Community College of Baltimore (CCB) each year under the scholarship program. In 1979 and 1980, four students were awarded scholarships each year to attend CCB. In 1981, four scholarships were offered and two students applied and attended CCB. Three minority student scholarships have been awarded for the 1981–82 academic year. Two of the students are attending CCB and one is attending Towson State University. Such community groups as the Urban Services Agency of the City of Baltimore and the Urban League have been active in selecting students to receive the scholarships awarded by the station. Bay Ex. 1, pp. 4–5.

17. Julian Sinclair Smith, the president, director and 49.9% shareholder of Bay, and proposed part-time general manager of the St. Petersburg station, resides at 811 St. Georges Road, Baltimore, Maryland. Bay Ex. 3, pp. 1,6.

18. Mr. Smith was born in Baltimore, Maryland on May 5, 1920. He attended Boy's Latin School in Baltimore and the Keyser High School in Keyser, West Virginia, where he graduated in 1939. During the last year of high school, he completed a correspondence course in radio given by the DeForest Training of Chicago. This enabled him to get an FCC first-class radio license in the spring of

1941. During the war years, 1944–46, he attended several U.S. Naval Schools specializing in electronics, the last one of which was RMS Bellevue in Anacostia, Washington, D.C. Bay Ex. 3, p. 1.

19. After he was discharged from the Navy in 1946, Mr. Smith attended Johns Hopkins University, McCoy College, and became a candidate for a degree in electrical engineering. He graduated in 1952 and then went into graduate school on a part-time basis. Bay Ex. 3, p. 1.

20. Mr. Smith was employed at the Processed Grains Corporation, Relay, Maryland, after graduating from high school in 1939. In the fall of 1940, he started to work at the Western Electric Company, Inc., Baltimore, Maryland. His duties consisted of assembling, wiring and cabling operations in connection with the installation of the first dial telephone system serving Baltimore. Bay Ex. 3, p. 1.

21. Mr. Smith resigned from the Western Electric Company on May 16, 1941 and started his career in broadcasting with radio station WFBR, Baltimore, Maryland, as a summer relief studio technician. In September 1941, Mr. Smith began employment with the Bendix Radio Division, a part of the Bendix Radio Corporation, Towson, Maryland. During his year's employment at Bendix, he advanced from assembly inspector to the position of assistant foreman of inspection. He supervised the construction of military equipment, such as transmitters, receivers and navigation equipment. Mr. Smith resigned in 1942 and returned to station WFBR on a permanent basis. He was employed as a studio and transmitter technician at WFBR until 1944, at which time he left to serve in the U.S. Navy. Bay Ex. 3, p. 2.

22. While in the service, Mr. Smith was stationed first at Great Lakes Training Base. From there he was transferred to Pre-Radio Material School in Chicago, Illinois. When the course was finished, he was sent to Gulfport, Mississippi for four months of additional primary training. At the completion of the course at Gulfport, he was sent to RMS Bellevue for seven months of secondary advanced training. Mr. Smith graduated near the top of his class and became a teacher in sonar (underwater radar). Bay Ex. 3, p. 2.

23. After discharge from the service in the spring of 1946, Mr. Smith returned once more to WFBR where, as assistant chief engineer, he directed the construction, installation and tests of WFBR(FM). He remained with WFBR until 1953, and during these years attended the Johns Hopkins University. Mr. Smith was also given the responsibility by management for planning a UHF television station during the first part of 1953. Subsequently, Mr. Smith resigned and joined the Institute for Cooperative Research of the Johns Hopkins University. While at the University, Mr. Smith worked on original and creative research in the field of dielectric measurement. He participated in the writing of technical papers which were published in the Electrochemical Journal of the Ameri-

can Institute of Electrical Engineers, on "Dielectric Breakdown Techniques" and "Dielectric Failure of Volume and Surface Types." Bay Ex. 3, pp. 2–3.

24. Mr. Smith resigned from the University staff in 1955 and joined the Glenn L. Martin Company (now Martin Marietta), Baltimore, Maryland, as an assistant design engineer in electronics attached to the Advanced Design Division. He worked on the design and analysis of automatic map-matching radar, terrain avoidance radar systems and miss distance indicators. During 1956, Mr. Smith was promoted to Group Engineer II and was assigned to the Matador Missile Project. His work on this program included supervision of five engineers and included technical design problems. Early in 1957, Mr. Smith was promoted to Group Engineer I and worked on guidance problems associated with medium range ballistic missiles. In June of 1957, he was promoted to the Unit Head of Electronics in the Advanced Design Division where he had the responsibility of supervising thirty engineers working on electronic guidance problems in the missile and aircraft fields. Bay Ex. 3, p. 3.

25. In 1958 Mr. Smith was made technical director of the Missile X program, a ground tracking radar design (classified), and had the responsibility of making technical proposals to the military, establishing the preliminary design specifications for the system. In October 1958, he had the complete responsibility for the direction and performance of seventy electronic engineers on a high priority missile guidance system sponsored by the military. Bay Ex. 3, p. 4.

26. Mr. Smith was promoted to manager of a new venture, the Advance Concepts Department at the Martin Company, which continued from 1959 to 1961. He left the Martin Company in 1961 to join Fairchild Stratos Corporation as the technical director of the AN/USD-5 surveillance Drone Program and served in this capacity from 1961 to 1963, supervising a 250-man engineering department which was located in Hagerstown, Maryland and Long Island, New York. Bay Ex. 3, p. 4.

27. Following the completion of the Drone Program in 1963, Mr. Smith joined International Telephone and Telegraph, Washington, D.C., as Deputy Director of the System Engineering Department. In February 1965, the Washington Division of ITT, Intelcom, was purchased from ITT by the Computer Sciences Corporation. The Intelcom/Computer Sciences Corporation served as engineering consultants for the Department of Defense, especially the Defense Communications Agency located in Washington, D.C. Mr. Smith continued to hold the position of Deputy Director of Systems Analysis with the Computer Sciences Corporation for several years before joining Systems Research/Wheeler Industries, Washington, D.C., in December of 1966. Bay Ex. 3, pp. 4–5.

28. While employed by the organizations listed above, Mr. Smith and a group of investors purchased in 1952 the Commercial Radio

Institute, an electronics school. During the 20-year period from 1952–1972, Mr. Smith, while the president of the Institute, taught electronics courses in television and radar for the evening school. These courses were designed to prepare the students to take the FCC first-class license examination for radio and television technicians. Because of more pressing commitments by Mr. Smith and other staff members to television broadcasting, and because of the heavy competition from the community colleges in the area, the school was closed during 1979. Bay Ex. 3, p. 5.

29. In 1967 Mr. Smith left Wheeler Industries in Washington, D.C. to work full time at the Commercial Radio Institute. In addition to teaching, he was heavily involved in all school activities, both day and night, until 1972. He eventually stopped teaching to turn his efforts to the construction and operation of UHF channel 45, Baltimore, Maryland, by Chesapeake Television, Inc. Chesapeake Television, Inc. is comprised of a small group of investors which included Mr. Smith, CRI and other associates. Mr. Smith has served as president and general manager of channel 45 (WBFF(TV)) since its inception in 1971. Bay Ex. 3, p. 5.

30. From 1973 to September 1978, Mr. Smith was involved with the application for the construction of television station WPTT(TV), Pittsburgh, Pennsylvania, which is licensed to Commercial Radio Institute, Inc. He supervised the construction of the television station and was responsible, with Frederick M. Himes, Jr., for hiring personnel from the local Pittsburgh area to staff the station. Bay Ex. 3, p. 6.

31. From 1976 to the present, Mr. Smith has also been involved with the application of Commercial Radio Institute, Inc. for a new UHF station in Columbus, Ohio. CRI is the permittee of channel 28 in Columbus, and Mr. Smith is presently engaged in construction efforts. Bay Ex. 3, p. 6; Tr. 111–12.

32. Mr. Smith is a member of the Johns Hopkins University Faculty Club. Bay Ex. 3, p. 6.

33. Upon grant of the Bay application for a construction permit to operate a UHF television station on channel 38, St. Petersburg, Florida, Julian S. Smith will serve as general manager of the St. Petersburg station on a part-time basis for at least twenty hours per week. Bay Ex. 3, p. 6; Tr. 117–18. Mr. Smith's responsibilities will include supervision of all aspects of station management and operation, including construction of the proposed facility, engineering details, film buying and programming strategy. Bay Ex. 3, p. 6.

34. Mr. Smith confirmed that at the time he signed Bay's application for St. Petersburg on January 26, 1979, the application said in response to Section IV-B, Question 21:[3]

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[3] Question 21 requests the name and position of the person who determines day-to-

General Manager - To Be Determined
Station Manager - To Be Determined.

Tr. 116–17. Mr. Smith explained that at the time Bay's application was filed, he was involved in a number of other applications pending before the Commission. Although he had thoughts of devoting some time to St. Petersburg back in 1979, in view of the other pending applications, Mr. Smith had difficulty in projecting his estimated involvement. Tr. 117. For instance, Mr. Smith testified that at the time of the Columbus hearing in 1979, he was involved in six or seven pending television applications.[4] As a result of the subsequent resolution of those proceedings, Mr. Smith has more time available now and will devote a minimum of twenty hours per week to St. Petersburg. Tr. 117–18, 120.[5]

35. Mr. Smith noted that he is a "workaholic," like Mr. Himes and Mr. Simmons, two of Bay's other stockholders. Mr. Smith works about sixty hours a week. Tr. 113–14. At present, Mr. Smith is general manager of WBFF(TV), Baltimore, Maryland, where he supervises the entire operation and buys films and other programming. Tr. 106. WBFF(TV) has been granted authority to operate on an STV basis and, as a result, Mr. Smith's responsibilities will be reduced if STV operation commences. Tr. 58. With regard to WPTT(TV) in Pittsburgh, Mr. Smith's present involvement is only supervisory since the station has a local station manager. Tr. 107. In any event, Mr. Smith now plans to devote his energies to the construction and operation of CRI's Columbus station and to St. Petersburg, if Bay's application is granted. Tr. 110, 113.

36. Frederick M. Himes, Bay's executive vice president, secretary, treasurer, director, 3.9% stockholder and proposed part-time station manager, was born in Charleston, West Virginia on May 14, 1924. In 1933 he moved to the Baltimore, Maryland area where he has since resided. His present address is 300 Garden Road, Towson, Maryland. He received most of his primary school and all of his secondary school training in the Baltimore public school system. After graduating in February 1943, he entered the U.S. Army and served in both the Combat Engineers Corps and Medical Corps. Following a medical discharge for recurring rheumatic fever in

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day programming, makes decisions and directs the operation of the station covered by the application and whether he is employed full time in the operation of the station.

[4] The application of Hartford Television, Inc. for a new television station on channel 61 at Hartford, Connecticut was dismissed by *Order* FCC 82M-1318, released April 22, 1982. Indianapolis 59, Inc.'s application for a new station at Indianapolis, Indiana was dismissed by *Memorandum Opinion and Order* FCC 81M-3034, released September 24, 1981. The application of Channel 49 Buffalo Television, Inc. for a station at Buffalo, New York was dismissed by *Memorandum Opinion and Order* FCC 81M-2306, released July 27, 1981.

[5] Mr. Smith added that eventually a full-time local manager will also be hired for St. Petersburg. Tr. 109.

October 1943, Mr. Himes received electronics training (broadcasting, commercial operating, servicing) under the GI Bill at the Commercial Radio Institute in Baltimore. In 1945 he commenced employment at radio station WFBR, Baltimore, Maryland, as a technician. Bay Ex. 2, p. 1.

37. In 1947 Mr. Himes began attending day and evening classes in accounting at the Baltimore College of Commerce, and continued there until 1949 while working at WFBR at the same time. In 1950 he entered the Johns Hopkins University and was graduated in June 1958 with a B.S. in History with honors. He attended the Graduate School and continued with courses in arts and sciences until 1978. At present, he belongs to the Johns Hopkins Alumni Association. Bay Ex. 2, p. 1.

38. In the past (1950s and early 1960s), Mr. Himes has in his spare time helped produce and tape several pilot programs for the Radio and Television Department of the Diocese of Maryland (Episcopal). Bay Ex. 2, pp. 1–2.

39. In 1961 Mr. Himes left WFBR to become an administrator at the Martin Company. He served on the Air Force-Dyna Soar Space Program as an administrator working with contracts and documentation. In 1962 he transferred to the NASA Gemini Space Program at the Martin Company and served in an administrative capacity in the Engineering Department until June 18, 1965. Bay Ex. 2, p. 2.

40. Since June 1965, Mr. Himes has been involved in the broadcast industry on a full-time basis. He became the general manager of radio station WFMM, Baltimore, Maryland, then licensed to the Commercial Radio Institute, Inc. He remained in that position until 1974. Bay Ex. 2, p. 2.

41. Since 1971 Mr. Himes has also served as the vice president of Chesapeake Television, Inc., the licensee of WBFF(TV), channel 45, Baltimore, where his duties have encompassed financial, accounting, legal and operational areas. Bay Ex. 2, p. 2. Mr. Himes testified that his duties at WBFF(TV) include maintaining financial operations, supervision of programming and supervision of the group responsible for technical operations and productions. Tr. 79–80. Mr. Himes reports to Mr. Smith, the general manager. Tr. 81. At WBFF(TV), Mr. Himes also has been involved with the station's educational program for college students which is designed to provide them with experience in station operations. The training program primarily is designed to assist minority persons, but also includes non-minority participants and women. He became executive vice president of Chesapeake Television, Inc. (licensee of WBFF(TV), Baltimore) and the Commercial Radio Institute, Inc. (licensee of WPTT(TV), Pittsburgh) in 1979. In September 1978, Mr. Himes acquired the additional duties of general manager of television station WPTT(TV), Pittsburgh. At WPTT(TV), he actively participated in the construction and start-up operations of the station, including

making decisions as to the hiring of employees. Ever since the station commenced over-the-air broadcasts, Mr. Himes has been actively involved in the day-to-day station operations of WPTT(TV). Bay Ex. 2, pp. 2–3. As general manager of WPTT(TV), Mr. Himes receives regular reports from the local station manager and travels to Pittsburgh. Tr. 83. He reviews logs and billing for WPTT everyday and provides advice as to programming, public affairs and news. Tr. 84–85.

42. As executive vice president, secretary, treasurer, director and 23.3% shareholder of CRI, Mr. Himes has also been involved in CRI's application for a new station on channel 28 at Columbus, Ohio. CRI is presently the permittee of channel 28. Mr. Himes is the proposed general manager of the Columbus facility. Bay Ex. 2, p. 3.

43. Mr. Himes will use the experience obtained in constructing UHF television stations in Baltimore (WBFF(TV), channel 45) and Pittsburgh (WPTT(TV), channel 22) to aid in the construction and operation of channel 38 at St. Petersburg. Upon grant of Bay's application for a construction permit to operate a UHF television station on channel 38, St. Petersburg, Mr. Himes, Bay's executive vice president, secretary, treasurer, director and 3.9% stockholder, will serve as station manager of the St. Petersburg station on a part-time basis for at least twenty hours per week. In this capacity, he will be involved in all phases of broadcast operation, including the hiring of personnel, day-to-day operating problems, selecting programming, and the implementation of news, public affairs and other programming. Bay Ex. 2, p. 3.

44. Mr. Himes works sixty hours per week (Tr. 82), presently dividing his time between WBFF and WPTT. He has not taken a vacation since 1965. Tr. 89. Once CRI's Columbus, Ohio station is constructed, Mr. Himes plans to devote forty hours a week to that station and will move to Columbus. Tr. 98. As general manager in Columbus, Mr. Himes will be involved in all phases of broadcast operations, including the hiring of personnel, day-to-day operating problems, and the implementation of news, public affairs and other programming. Tr. 98–99. If Bay receives a construction permit for St. Petersburg, Mr. Himes will commute to St. Petersburg on a regular basis to meet his commitment of twenty hours per week. Tr. 99, 101.

45. Mr. Himes' decision to be involved in the St. Petersburg operation was made around the time the exhibits were being prepared in April 1982. As a result of the settlements and dismissal of the Indianapolis, Hartford and Buffalo applications in which Mr. Himes had been involved, and in light of the proposed STV operation for WBFF(TV), Mr. Himes decided that he had sufficient time available to make a commitment to be part-time station manager in

St. Petersburg. Tr. 101–02. He testified that although he will continue to have some responsibility for the Baltimore[6] and Pittsburgh operations, his duties will not impede his ability to devote at least forty hours a week to the Columbus station and at least twenty hours a week to St. Petersburg. Tr. 86, 103–04.

46. Robert L. Simmons, Bay's vice president for sales and a director, is not a stockholder, but has a 10.1% interest in CRI and is proposed as part-time sales manager of the St. Petersburg facility. Bay Ex. 4, p. 2. Mr. Simmons was born in Baltimore, Maryland, on April 16, 1934. He grew up in Baltimore and graduated from Baltimore City High School in 1953. He went on to the University of Maryland from which he was graduated in 1958. From 1958 to 1959, Mr. Simmons was employed at the Reuben-Donnelly Company in Baltimore as a sales representative. For eight months in 1959, he was employed as a regional producer by the Bert Claster Productions, the producer of the children's television program, "Romper Room." From 1959 to 1961, he was the creator and producer of a syndicated children's program titled "Aunt Mary's Birthday Party." Bay Ex. 4, p. 1.

47. In 1961 Mr. Simmons joined Westinghouse Broadcasting Corporation where he was an employee until 1969. During his tenure with Westinghouse, he held the following positions: From 1961 to 1963, he was a sales representative at WJZ-TV, Baltimore, Maryland. From 1963 to 1964, he was a sales representative with TVAR in Chicago, Illinois. TVAR is the in-house sales representative for Westinghouse Broadcasting Corporation. From 1964 to 1967, he was manager of the TVAR West Coast Regional Office in Los Angeles, California. For seven months in 1967, Mr. Simmons was sales representative at TVAR in New York City. From 1967 to 1969, he was the sales manager of WJZ-TV, Baltimore, Maryland. Bay Ex. 4, pp. 1–2.

48. Mr. Simmons left Westinghouse Broadcasting Corporation in 1969 and joined the Commercial Radio Institute as the general sales manager of WFMM(FM), Baltimore, Maryland. From 1971 to 1978, he served as the general sales manager of WBFF(TV), channel 45, Baltimore, Maryland, which is licensed to Chesapeake Television, Inc. In 1979, Mr. Simmons was made a vice president of sales of Chesapeake Television, Inc. and the Commercial Radio Institute, Inc. In March 1982, he became a 5.4% stockholder of Chesapeake Television, Inc. Bay Ex. 4, p. 2; Tr. 38–39.

49. During his career in broadcasting, Mr. Simmons has attended numerous seminars in broadcast management and broadcast law sponsored by Westinghouse Broadcasting Corporation. In addition, in 1965 he attended a special seminar for broadcast executives

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[6] Mr. Himes noted that if Bay's St. Petersburg application is granted, a new station manager will probably be appointed in Baltimore. Tr. 102–03.

sponsored by the Harvard Business School under the auspices of Westinghouse Broadcasting Corporation. In 1968 he attended a Value Program for Industry Seminar sponsored by Westinghouse, the purpose of which was to train its executives in the use of systems analysis and flow chart analysis for problem solving. Bay Ex. 4, p. 2.

50. At the present time, Mr. Simmons devotes approximately 70 to 75 hours a week to the operations of WBFF(TV), Baltimore, and WPTT(TV), Pittsburgh. Tr. 40. His responsibilities at WBFF include supervising the local sales effort, which is conducted by the local sales manager, and dealing with the station's national sales representative and independent program syndicators. Tr. 39. Mr. Simmons travels to Pittsburgh two or three days a month to supervise local sales efforts there. Tr. 43.

51. Once CRI's Columbus station commences operation, Mr. Simmons will move his base of operations to Columbus where he will organize and run the sales department. Tr. 48. He intends to establish a permanent residence in Columbus and devote between thirty and fifty hours a week to the operation of the Columbus station. Tr. 50–52. If Bay's application for St. Petersburg is granted, he will rent a home or apartment in St. Petersburg and commute from Columbus once a week. Tr. 53–54. Since Baltimore and Pittsburgh are mature operations, Mr. Simmons noted that they will require his presence less than Columbus and St. Petersburg. Tr. 55. Out of his 70–75 hour work week, Mr. Simmons will devote nearly all of his time to Columbus and St. Petersburg. Tr. 56–57. He will work at least twenty hours a week in St. Petersburg, where, in his capacity as general sales manager and vice president in charge of sales, he will set up and run the sales department. Bay Ex. 4, p. 2; Tr. 53.

52. Julian Duncan Smith is not a stockholder of Bay, but has a 4.8% interest in CRI and will serve part time as technical director of Bay's St. Petersburg station. Mr. Smith was born in Baltimore, Maryland on November 6, 1953. He attended and graduated from the Boy's Latin School in 1973 and attended the University of Baltimore. He resides at 811 St. Georges Road, Baltimore, Maryland. Bay Ex. 5; Tr. 60.

53. Since graduating from the Boy's Latin School, Mr. Smith helped to build and install studio and transmitting equipment for WBFF(TV). In addition, he supervised the transmitter installation at WPTT(TV), channel 22, Pittsburgh, during 1978 and 1979. Upon completion of the construction of WPTT(TV), he returned to channel 45 in Baltimore where he is currently involved in performing equipment maintenance, as well as installing new equipment purchased by the station. In addition to his duties at WBFF(TV), from the summer of 1979 to the present time, he has been an independent contractor working exclusively for Comark Communications in Southwick, Massachusetts. During this period, he has

installed and/or retrofitted over twenty UHF television stations throughout the United States and Canada. Bay Ex. 5; Tr. 61–62.

54. Mr. Smith testified that, upon grant of a permit to Bay, he will resign as an independent contractor for Comark Communications and go to St. Petersburg to start construction of Bay's proposed facility. Tr. 65, 71. As part-time technical director, he will be involved in the installation of the transmitter, the installation of the studio and the servicing of the equipment. *Id.* Furthermore, he intends to work actively in the station, following the construction phase, as technical director and technical supervisor for a minimum of twenty hours a week. Bay Ex. 5; Tr. 75–77.

Home TV, Incorporated

55. Home is a corporation created for the purpose of applying for and operating a new UHF television station on channel 38 at St. Petersburg, Florida. It has no other business interests. The stock ownership interests in the company and the officers and directors are as follows (Home Ex. 1):[7]

		Stock %
Directors:	Andre M. White	8.33
	Robert H. Ruark	8.33
	Roger S. Tucker	8.33
	Joane H. Miller	8.33
	F. Jeffrey Rahall	8.33
Officers:	Andre M. White, President	
	Herman W. Goldner, Vice President	8.33
	Beverly Ann Kennard, Secretary	
	F. Jeffrey Rahall, Treasurer	
	Robert H. Ruark, Assistant Secretary	
Other Stockholders:	Moses White	8.33
	Dick A. Greco, Jr.	8.33
	Robert L. Gilder	8.33
	Todd A. Spoeri	8.33
	William J. Grant, Jr.	8.33
	Edna C. Jones	8.33

Moses White, his son Andre White, Robert Gilder and Edna Jones are Black Americans. Home Ex. 1. Andre White is a lifetime resident of the St. Petersburg/Tampa area. Mr. Rahall has been a resident of St. Petersburg for over eighteen years. Mr. Goldner has been a resident of St. Petersburg for over thirty years. Home Ex. 3, pp. 1–2.

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[7] Home Exhibit 1 states that each of the company's stockholders has an interest of 8.33%. Home arrives at this figure by deleting the interest of J. Eugene Danzey, who divested his stock interest on April 19, 1982. However, the presiding judge's order concerning Mr. Danzey's divestiture accepted Home's amendment for Rule 1.65 purposes only and stipulated that acceptance of the amendment would not improve Home's comparative position. *Order* FCC 82M-1543, released May 14, 1982. Prior to April 19, 1982, the stock interest of each named person, except for Beverly Ann Kennard, was 7.69%.

56. Todd A. Spoeri holds the honorary title of vice president and general manager of the northeast region for the Cable Communications Division of Storer Broadcasting Company. Mr. Spoeri, however, has alleged that he is not a corporate officer or director of Storer Broadcasting Company. The Cable Communications Division of Storer Broadcasting Company is the operational entity which administers the company's cable systems located in approximately twenty states. The cable systems are owned by wholly- or majority-controlled subsidiaries of the company established in the various states. Storer also is the licensee of several broadcast stations throughout the country. Mr. Spoeri is a vice president of various wholly-and partially-owned Storer subsidiaries operating cable systems in Maryland, Virginia, Delaware, Kentucky, New Jersey, Pennsylvania and Connecticut. Mr. Spoeri is not an officer, director, stockholder or employee of any Storer-held cable system in the state of Florida, and he does not have any supervisory or operational control or authority over any of the cable systems in Florida or elsewhere other than in the northeast region in the states named above. Mr. Spoeri is the beneficial owner of 500 shares of Storer Broadcasting Company stock held in a street name for his account with Merrill, Lynch, Pierce, Fenner and Smith of Fort Lauderdale, Florida. On January 6, 1982, he was granted 800 shares of Storer stock under its employee Restricted Stock plan. These 1,300 shares combined represent .0093% of the issued and outstanding shares of Storer stock. Mr. Spoeri also owns 823 shares of Series A, preferred stock of Gulf United Corporation. Gulf is the parent of the licensees of stations WVOJ(AM), Jacksonville, Florida; WNDE(AM), WFBQ(FM), Indianapolis, Indiana; WWNR(AM), Beckley, West Virginia; WKAP(AM), Allentown, Pennsylvania; KTXQ(FM), Fort Worth, Texas; WGHP(TV), High Point, North Carolina; and WTSP(TV), St. Petersburg, Florida; and owns an interest in KOOL Radio-Television, Inc., licensee of stations KOOL(FM) and KOOL(TV), Phoenix, Arizona. According to Gulf's Ownership Report (FCC Form 323) filed June 4, 1981, there are 31,736,105 outstanding shares of Gulf voting stock which are publicly traded. Mr. Spoeri's percentage of ownership in Gulf is, therefore, .0026%. Home Ex. 2, pp. 1–2.

57. Robert H. Ruark is the president and 55% owner of International Broadcast Consultants (IBC). IBC owns 100% of the stock of Dana Broadcasting Corporation, which in turn owns 75% of the stock of Video Entertainment Corporation, proposed assignee of a construction permit for UHF television station WULT, New Orleans, Louisiana. The Commission granted its consent to this assignment (BAP-811021KE) on January 25, 1982. However, the parties have not yet consummated the transaction. On May 1, 1982, Montage Corporation acquired a 49% interest in Storm Broadcasting Corporation, permittee of WHFL(FM), Havana, Florida. Montage

Corporation also acquired an option to purchase additional shares of stock in Storm Broadcasting Corporation at a later time. Montage Corporation is a wholly-owned subsidiary of IBC. Home Ex. 2, pp. 2–3.

58. Robert L. Gilder is the senior vice president and full-time general manager of station WTMP(AM), Tampa, Florida. Mr. Gilder, however, owns no stock in the licensee of WTMP(AM). Mr. Gilder became a principal of Home when Home merged with Minority Broadcasters of Florida, Inc. on February 4, 1981, after the "B" cut-off date in this proceeding. On December 11, 1981, after designation of this proceeding for hearing, Home filed an amendment containing a letter from Mr. Gilder, dated December 7, 1981, stating that upon grant of a construction permit to Home for a new television station to operate on channel 38 at St. Petersburg, Florida, he will resign as an officer and employee of station WTMP(AM), Tampa, Florida, and will sever any and all connections that he might have with WTMP. Home Ex. 2, p. 3.

59. J. Eugene Danzey, a former 7.69% stockholder of Home, holds 100% of the stock of Rolyn Communications, Inc., licensee of standard broadcast station WRXB, St. Petersburg, Florida. When Home originally filed its application on August 3, 1979, it represented that upon grant of a construction permit, Mr. Danzey would divest himself of his interests in WRXB. Mr. Danzey divested himself of all of his interests in Home on April 19, 1982, thus fulfilling the equivalent of his predesignation representation to divest himself of WRXB. Home Ex. 2, pp. 3–4. No other principal of Home has any ownership interest in or is an officer or director of any broadcast station, newspaper, cable system or other media of mass communications. Home Ex. 2, p. 4.

60. Home proposes to integrate Andre White, Herman Goldner and F. Jeffrey Rahall into full-time management positions. On the "B" cut-off date in this proceeding, July 7, 1980, Messrs. Goldner, White and Rahall had a combined stock interest of 41% in Home. At present, however, each owns only 8.33% of Home for a combined total of 24.99%. Home Ex. 3.

61. Andre White is a Black American who has been a lifetime resident of St. Petersburg. Mr. White is proposed as the president and chief executive officer of Home and full-time director of community relations for the station. Home Ex. 1; Ex. 3, p. 1. Mr. White was the host-producer of a talk show for WFLA, channel 8, Tampa, Florida, for which he produced his own material and acted as host for a period of five years. Tr. 284–85. Mr. White is currently employed as the equal opportunity officer with the Community Action Agency. Tr. 285. He testified that in this job he attempts to "bring about better community relations among minorities, females, Blacks, Hispanics. . . ." Tr. 286. Mr. White will resign this position to work full time at the station if Home is granted the construction

permit. Tr. 286. Mr. White has been active in the local Urban League, NAACP and Frontiers of America, an organization that seeks to foster minority involvement in business. Tr. 288–89.

62. F. Jeffrey Rahall has been a resident of St. Petersburg for over eighteen years. Mr. Rahall is proposed as the full-time comptroller of Home and is presently its treasurer. Home Ex. 3, p. 1; Tr. 290. If Home receives a construction permit, Mr. Rahall will resign his present employment and work full time at the station. Tr. 292.

63. Herman Goldner has been a resident of St. Petersburg for over thirty years and served as its mayor from 1961 to 1967 and from 1971 to 1973. Mr. Goldner is proposed as a senior executive of Home who will assist and advise the president in carrying out the policy directives issued by Home's Board of Directors. Home Ex. 3, pp. 1–2. Mr. Goldner, now a retired lawyer, has a masters degree in business administration from Harvard University and a bachelor of science degree from Miami University in Oxford, Ohio. Tr. 316. Mr. Goldner's law practice was primarily oriented in business problems solution and, therefore, he feels especially qualified to advise Home's president. Tr. 316, 339. He also will be the full-time director of news and business service for the station. Tr. 317.

64. Mr. Goldner is involved in various civic activities in St. Petersburg which include: President, Florida Gulf Coast Symphony; Member, St. Petersburg Art Museum; Member, Bay Front Hospital; Member, Chamber of Commerce; and Honorary Member and Founder of the Tampa Bay Regional Planning Association. Tr. 336–38.

Misrepresentation/Lack of Candor Issue Against Home

65. On March 17, 1982, Bay filed a petition to enlarge issues against Home requesting the addition of a misrepresentation issue. Bay reiterated its request in its April 1, 1982 reply to Home's opposition. The request was based upon statements made in a February 4, 1982 affidavit of Todd A. Spoeri, a Home principal, which Home submitted with its February 12, 1982 opposition to a previous request for enlargement of issues. Bay alleged that some of these representations appeared to conflict with statements made earlier by Mr. Spoeri in an August 12, 1980 letter to the directors and stockholders of Home. In addition, it was alleged that Mr. Spoeri's February 4, 1982 affidavit also contradicted a representation made by Home in its December 21, 1981 amendment.

66. Specifically, Mr. Spoeri represented in his affidavit that he was given the title of vice president and general manager of the northeast region of the Cable Communications Division of Storer Broadcasting Company in November 1981, whereas it appeared that Mr. Spoeri had indicated in his August 12, 1980 letter that he had already been appointed to that position. Moreover, Mr. Spoeri represented that his title was "honorary," whereas that position was

not so qualified in his August 12, 1980 letter or Home's December 21, 1981 amendment. Finally, in his February 4, 1982 affidavit, Mr. Spoeri represented that he was contemplating returning to St. Petersburg to work full time at the station as of February 4, 1981 and that "up until recently" he still intended to be employed full time as general manager of the station if Home was granted a construction permit. Those representations also appeared to conflict with Mr. Spoeri's August 12, 1980 letter in which he notified Home that he was resigning as president and general manager at that time. Since the various satements made by Mr. Spoeri appeared to differ, the presiding judge added the misrepresentation issue against Home as requested by Bay. *See Memorandum Opinion and Order* FCC 82M-1115, released April 8, 1982.

67. Mr. Spoeri prepared the original application for channel 38, St. Petersburg, Florida, filed by Home on August 3, 1979. Bay Ex. 6, p. 1. He signed the application as president of Home and the application disclosed that he was also proposed as general manager of the television facility.[8] At the time Mr. Spoeri commenced working on Home's television application in January or February 1979, he had no other employment. Tr. 162–63.

68. Subsequent to the filing of the application, Mr. Spoeri became affiliated with Storer Broadcasting Company. Tr. 164. In mid-August 1979, he was named national program manager of the Cable Communications Division of Storer Broadcasting Company, a full-time position. Tr. 165–66. On September 21, 1979, Home filed an amendment to its application which stated that Mr. Spoeri was national program manager of Storer Cable TV, a division of Storer Broadcasting Company, Miami, Florida. Bay Ex. 6, pp. 1, 6–8; Tr. 165.

69. As national program manager, Mr. Spoeri worked to a large extent with local communities, essentially in the northeast, on the preparation of cable television franchise applications. In this connection, he appeared before public bodies on behalf of Storer. Tr. 166–67; 187.

70. Since 1979, Mr. Spoeri has continuously worked with Storer's Cable Communications Division. Tr. 167.[9] In approximately the late summer of 1980, he received a promotion and was named vice president and general manager for the northeastern area of Storer's Cable Communications Division. Bay Ex. 7, p. 1; Tr. 167–68. Storer's northeastern area included New York and the New England states. Tr. 171. In connection with his promotion, Mr. Spoeri moved to Hamden, Connecticut in September 1980. Bay Ex. 7, p. 1; Tr. 171. He

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[8] When the original application was filed, Mr. Spoeri was a 10% stockholder of Home.

[9] Mr. Spoeri had formerly been employed with Storer from 1966 to 1973. In the intervening six years, he had managed two television stations. Tr. 248.

was also elected as an officer of the wholly-owned subsidiary corporations of Storer Cable TV holding the franchises to operate cable systems in New Haven, Clinton and Groton, Connecticut. Bay Ex. 7, p. 1.

71. Home failed to amend its application to report Mr. Spoeri's first promotion at Storer to the position of vice president and general manager of the northeast area. Tr. 191–92.

72. Mr. Spoeri also received another promotion within Storer, and at the time he testified was the vice president and general manager of the northeast region of the Cable Communications Division of Storer. He was notified of the promotion in July 1981. However, he could not recall the effective date of that promotion. From July to November 1981, he retained an operational line of authority for Storer's systems in Connecticut and was also involved in activities dealing with the northeastern region. In November 1981, Mr. Spoeri moved his residence in connection with his new position to Plantation, Florida. He, therefore, estimated the effective date as being between July and November 1981. Bay Ex. 6, p. 3; Ex. 7, p. 2; Tr. 172–73. In his February 4, 1982 affidavit, Mr. Spoeri represented that he was given this honorary title in November 1981 when he moved to Plantation, Florida. Bay Ex. 6, p. 3.

73. At the hearing, Mr. Spoeri explained that his position is actually "honorary" and that he has never been a corporate vice president of Storer. Home Ex. 2, p. 1; Bay Ex. 6, p. 3; Tr. 169, 179–81, 222. The title of vice president and general manager was conferred merely to permit Mr. Spoeri to deal more effectively with the various cable systems in the northeast region. In addition, he was routinely appointed as one of the vice presidents of each subsidiary that he supervised in the northeast region. This includes subsidiary corporations located in Maryland, Virginia, Delaware, Kentucky, New Jersey, Pennsylvania and Connecticut. Bay Ex. 6, p. 2; Tr. 190–94. The subsidiaries either have already obtained a franchise or are seeking a franchise. In the latter case, the entity is merely a shell corporation. Tr. 195–96. On the date Mr. Spoeri testified, he was an officer in a total of 40–50 Storer subsidiaries. Tr. 218–19. He has no authority other than in the northeast region. Tr. 177.

74. Mr. Spoeri explained at the hearing that there are definite differences in the terms "northeast area" and "northeast region" as used by Storer. In the Storer organizational concept, an "area" has always been smaller than a "region." At the time Mr. Spoeri was responsible for the northeast area, it encompassed essentially the New England states and he then reported to the person who was the vice president and general manager of the eastern region. At first Storer had two regions in the country, the eastern region and the western region. However, because of the explosive growth of the cable market, Storer redivided the country into four regions. The eastern region was divided into the northeastern and southeastern

regions and the western region was broken into a central and far western region. The line of demarcation between the northeastern and southeastern regions was the southern borders of Virginia and Kentucky. When Mr. Spoeri became the northeast regional manager, Storer changed the northeast area designation of its grouping of operations in the New England area and redesignated it the "Connecticut area" or "New England area" to avoid confusion with the designation of "northeast region." Bay Ex. 7; Tr. 173–75, 196–97.

75. On December 21, 1981, Home amended its application to reflect Mr. Spoeri's promotion to vice president and general manager of Storer Cable TV located in Miami, Florida. Tr. 176–77. Mr. Spoeri has two offices, one located in North Miami and one in Springfield, Virginia. Tr. 198.

76. On August 12, 1980, Mr. Spoeri sent a letter to the Board of Directors and stockholders of Home in which he tendered his resignation as president and general manager of the proposed television station in St. Petersburg. Bay Ex. 8.

77. At a Special Joint Meeting of Home's stockholders and Board of Directors held September 3, 1980, Mr. Spoeri's resignation was accepted and J. Eugene Danzey was unanimously elected to serve as president for the remainder of Mr. Spoeri's term. Bay Ex. 9, pp. 1–2. This change of officers was not reported by Home in any amendment to its application. However, as a result of Home's merger with a previous applicant in this proceeding,[10] Home reported in an amendment filed February 6, 1981 that Andre White was then the president of Home while Mr. Spoeri retained his position as a director.[11] Bay Ex. 6, pp. 1–2; Tr. 298. Mr. Spoeri continued to serve as a director of Home until the May 25, 1981 election of new officers and directors which was reported in Home's June 15, 1981 amendment. Bay Ex. 6, p. 2; Tr. 206–09. From that point on, he was no longer an officer or director of Home. Bay Ex. 6, p. 2.

78. Mr. Spoeri's testimony conflicts in some instances with respect to the portion that was elicited prior to the luncheon recess on the day he testified and that elicited afterwards.

79. Before the luncheon recess, Mr. Spoeri testified that he was never contacted by any of Home's officers, directors or counsel about the proposal for his full-time employment after his August 12, 1980 letter. Tr. 211. In a reply pleading filed by Home in this proceeding on February 24, 1981, it was represented at page 3, footnote 2, that: "Mr. Spoeri intends to move back to St. Petersburg and work full-time as general manager of the station upon grant of a permit."

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[10] On October 29, 1981, the Commission approved the merger agreement between Home and Minority Broadcasters of Florida, Inc., which required Minority to dismiss its application.

[11] The amendment also reflected that Mr. Spoeri would be a full-time employee, but no title was specified.

Bureau Ex. 1. Before the luncheon recess, Mr. Spoeri responded in the negative when asked if Home had contacted him about employment with Home at the time of that reply. Moreover, he characterized the statement made in the reply as "some misunderstanding," since his August 12, 1980 letter had informed Home that he would no longer be proposed as a full-time employee. Tr. 210–12. Mr. Spoeri did not, however, participate in the preparation of that reply nor was he consulted about the information contained therein. He claimed that the first time he saw that reply was the day he testified in this proceeding. Tr. 238–39.

80. Before lunch, Mr. Spoeri was referred to an affidavit which he subscribed and swore to on February 4, 1982. He was directed to prepare that affidavit by Home's counsel in order to respond to a petition to enlarge issues in this proceeding.[12] Tr. 213–15. In that affidavit, Mr. Spoeri represented:

> ". . . At that time [August 3, 1979] and up until recently, it was my intention to be employed full time as general manager of the station and to direct its operations if Home TV were granted a construction permit." Bay Ex. 6, p. 1.
>
> ". . . At that time [February 4, 1981] I still contemplated returning to St. Petersburg to work full time at the station if and when a construction permit were granted." Bay Ex. 6, p. 2.
>
> "Because of the extended delay of this proceeding and the consequent change in my circumstances and other employment, I have now decided that I will not move to St. Petersburg nor be employed at the station in the event a construction permit is granted to Home TV, nor do I intend to be nor will I accept a position as an officer or director of Home TV as long as I am employed by Storer. I therefore have advised the appropriate officials of Home to amend the application to reflect this fact." Bay Ex. 6, p. 5.

81. When asked whether his statement was true that "up until recently, it was [his] intention to be employed full time as general manager," Mr. Spoeri responded that he was not sure what the word "recently" meant. When it was pointed out that "recently" was a word he used, he acknowledged that it was perhaps "a misuse of wording" since he had made his decision on August 12, 1980. Mr. Spoeri claimed that at the time he reviewed the affidavit, he did not remember when he had made his decision regarding Storer and Home. He acknowledged that August 12, 1980 was not recent and that the word "recently" was misused in his affidavit. He claimed that the error was innocent since he had been honestly mistaken at the time about the date of his decision regarding his association with Home, which was made around August 1980. Mr. Spoeri first testified that he did not have the advantage of all the related correspondence spread out in front of him. But he later admitted that he did have access to records regarding his relationship with

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[12] Mr. Spoeri's affidavit was attached to the opposition pleading filed by Home on February 12, 1982.

Home at the time he prepared his affidavit; however, he did not recall requesting all of the documents or reviewing all the materials available. Nevertheless, Mr. Spoeri maintained that he had made the statements in good faith. Tr. 213–17.

82. During the lunch break, Mr. Spoeri reviewed Home's reply of February 24, 1981 and his affidavit of February 4, 1982. Present during that review were Home's counsel, Vincent Pepper and James McGillan, and Messrs. Goldner, Ruark, Rahall and White, all principals of Home. Tr. 230–31. During that review, Mr. Spoeri was presented with documentation of telephone records by Mr. McGillan which Mr. Spoeri claimed aided his recollection of discussions that had occurred over the past two years. Tr. 231.

83. During his re-direct examination after lunch, Mr. Spoeri departed from his prior testimony in that he could then recall "many" conversations with people associated with Home, and specifically several with Mr. Goldner or Mr. McGillan, about his August 12, 1980 letter of resignation to Home. Tr. 232–33.

84. According to Mr. Spoeri, he was first contacted about his resignation by Herman Goldner, a stockholder and vice president of Home, in February 1981. Tr. 233–34. According to Mr. Goldner, he did not believe that Mr. Spoeri's August 12, 1980 letter of resignation represented a final decision. Mr. Goldner explained that, at the time, Home had accepted Mr. Spoeri's resignation as president and elected a new president because Home needed an immediate replacement for him in order to discharge the day-to-day functions of that office, *e.g.*, continuous communications with Home's counsel. On the other hand, Mr. Goldner did not consider Mr. Spoeri's resignation as general manager to be a pressing matter because there were no required functions for the manager to perform at that time. Tr. 321–24.

85. Mr. Goldner understood that the Commission requires an applicant to report any changes in the information contained in its application. At the time of Mr. Spoeri's resignation, Mr. Goldner assumed the responsibility for informing Home's communications counsel of any changes so that those matters could be reported to the Commission. Mr. Goldner considered Mr. Spoeri's resignation as president a significant matter and believed that the change in that office was reported to the Commission. Mr. Goldner claimed that he did not consider Mr. Spoeri's resignation as general manager to be a significant matter because he did not consider that decision to be final. Therefore, he did not report the matter to either the Commission or to Home's communications counsel. Mr. Spoeri's August 12, 1980 letter was never sent to Home's counsel until Mr. Goldner sent counsel that document in order to respond to a motion to produce documents filed by Bay on January 27, 1982. Mr. Goldner believes that that was the first time Mr. McGillan became aware of that letter. At the time he testified, Mr. Goldner, in retrospect,

believed that he should have reported Mr. Spoeri's resignation as general manager. Tr. 322–26.

86. Mr. Goldner recalled that his first contact with Mr. Spoeri about his resignation was over the Christmas holidays in 1980, rather than in February 1981 as Mr. Spoeri believed. Tr. 299, 326–27. In any event, both Mr. Goldner and Mr. Spoeri recalled that Mr. Goldner attempted to reach Mr. Spoeri by phone, talked with Mr. Spoeri's wife and that his call was subsequently returned by Mr. Spoeri. Tr. 254–55, 298. The testimony of Messrs. Spoeri and Goldner does not vary in any significant respect with regard to the substance of that conversation. Mr. Goldner asked Mr. Spoeri to reconsider his August 1980 resignation as general manager because Mr. Spoeri was the only principal with television management experience and would be valuable if Home's application were granted. Mr. Spoeri told Mr. Goldner that he would "reconsider" since he did not want to turn down his friend out of hand. Tr. 235, 250, 252, 299. However, Mr. Spoeri asked Mr. Goldner what could be provided in the way of interim employment or some assurance that he could earn a living since he needed an immediate income. Mr. Goldner indicated that he could understand his position, but he merely wanted Mr. Spoeri to leave the door open and "contemplate the possibility" of being Home's general manager. Mr. Spoeri agreed to do so since he considered that a reasonable request and Mr. Goldner was not asking for a firm commitment. During their conversation, Mr. Goldner told Mr. Spoeri that Home was not in a position to continue him on the payroll in any manner while its application was pending. Mr. Goldner did tell Mr. Spoeri that if Home was granted a construction permit, then Home would certainly pay him the equivalent of whatever he was earning. However, Mr. Goldner explained that he could not make a proposal as such and he made no specific offer as to wages or salary. Mr. Spoeri believed that Mr. Goldner could not make any firm offer at the time because of the uncertainty of Home's application being granted. Mr. Goldner believed that he could not give Mr. Spoeri any guaranteed offer because Home did not have sufficient finances to put him on the payroll and there was no way of knowing when Home's application would be considered. Mr. Goldner did not seek a firm commitment from Mr. Spoeri and Mr. Spoeri did not give a firm answer. The matter was ended with Mr. Spoeri agreeing to consider the possibility of working for Home. Nothing definite was established except that he would not take the position with Home unless Mr. Goldner made a reasonable offer. Tr. 234–35, 250–52, 298–300, 326–30.

87. Mr. Goldner was aware of the fact that in his August 12, 1980 letter, Mr. Spoeri had stated that his long-term intention was to remain with Storer. However, Mr. Goldner understood his conversation with Mr. Spoeri to mean that he would continue to consider the possibility of becoming Home's general manager until Home could in

fact make him an offer. Mr. Goldner thought that this would continue until Home knew it would receive a construction permit. Then, at that time, Mr. Goldner would make Mr. Spoeri an offer of a contract with a salary that would enable him to accept the general manager position. According to Mr. Goldner, he believed that up until February 1982, when Home's counsel advised him that there had to be a final statement as to whether Mr. Spoeri was to be the general manager. Mr. Goldner claimed that he had no knowledge that this matter was material to the consideration of Home's application. Mr. Goldner also claimed that he was not seeking Mr. Spoeri's reconsideration because of any FCC policy, but rather he believed that it was in the best interests of Home to have Mr. Spoeri, and his considerable television experience, as part of management. Tr. 304, 326–30.

88. A Home amendment filed February 6, 1981 indicated that Mr. Spoeri would be a full-time employee of Home. Mr. Goldner had furnished that information to Mr. McGillan by phone and signed the amendment. Mr. Goldner testified that he had interpreted his first conversation with Mr. Spoeri to mean that he was not committing himself to accepting the general manager position, but that he was not committing himself to resignation either. Tr. 331–32.

89. Mr. Goldner had received Home's February 24, 1981 reply in which it was stated at footnote 2 that: "Mr. Spoeri intends to move back to St. Petersburg and work full-time as general manager of the station upon grant of a permit." Mr. Goldner had furnished much of the information in that document to Mr. McGillan by phone. However, he did not recall discussing Mr. Spoeri's intentions with Mr. McGillan and assumes that Mr. McGillan simply responded on the basis of the information contained in Home's application. In any event, Mr. Goldner did review Home's reply and believed that the quoted statement was "an overstatement of the facts at the time." Mr. Goldner believed, based on his conversation with Mr. Spoeri during the Christmas season of 1980, that he should have clarified the statement in the reply about Mr. Spoeri's intentions. Mr. Goldner testified that he had not given any significant consideration to that statement, but acknowledged that the statement was "probably not correct." Tr. 331–33.

90. During the lunch break on the day that Mr. Goldner testified, Mr. McGillan produced some telephone records which reflected that he called Messrs. Spoeri and Goldner in January 1982. In their first conversation, Mr. McGillan told Mr. Goldner that there was some kind of cross-ownership problem which Mr. Spoeri had to do something about and Mr. Goldner indicated that he would call Mr. Spoeri. On January 27, 1982, Home was served with interrogatories. At that time, Mr. McGillan called Mr. Goldner again. During that conversation, Mr. Goldner informed Mr. McGillan that he would be responsible for the rough draft of the responses to the

interrogatories and the related motion to produce documents. Mr. McGillan told him that there would have to be a final statement about Mr. Spoeri's decision regarding the general manager position since it was necessary to form definite responses. Tr. 300–04, 330–31, 346.

91. Mr. Goldner then called Mr. Spoeri and asked him to make up his mind about the matter. Tr. 303. That phone call was placed before Mr. Spoeri's February 4, 1982 affidavit. Mr. Goldner again encouraged Mr. Spoeri to take the general manager position, but told Mr. Spoeri that he needed a statement as to where Mr. Spoeri stood in order to respond to some interrogatories. Mr. Spoeri told him that he could not in good conscience continue to represent himself as the general manager of Home. Mr. Spoeri explained that two and a half years had gone by and he felt that his future lay with Storer, where he had received an opportunity to acquire stock and was satisfied with his employment. Mr. Spoeri claimed that he advised Mr. Goldner to amend the Home application to reflect that fact. Tr. 235–36, 303–04.

92. Sometime prior to February 4, 1982, Mr. Spoeri discussed with Mr. McGillan the preparation of his February 4, 1982 affidavit, including the importance of his stating unequivocally where he stood. Mr. Spoeri's most recent conversation with Mr. McGillan took place on January 29, 1982. In his affidavit of February 4, 1982, Mr. Spoeri stated: "I have now decided that I will not move to St. Petersburg nor be employed at the station." He claimed that he had used that context because counsel had explained that a final unequivocal statement needed to be filed at that time. Mr. Spoeri denied that it would have been more honest to state that he had decided not to be employed at Home as of August 1980 because Mr. Goldner had asked him to reconsider his decision on a couple of occasions. Mr. Spoeri maintained that, if a proper employment offer were made for Home's station, he would still seriously consider it. He claimed that he had continued to contemplate the possibility of accepting the position from the time he was first asked to reconsider his resignation in February 1981 until the end of January 1982. At that time there was no offer, so, according to Mr. Spoeri, he concluded that he no longer wished to be considered for employment with Home. Bay Ex. 6, p. 5; Tr. 235–38, 256–61.

Ultimate Findings and Conclusions

Misrepresentation/Lack of Candor Issue Against Home

93. The misrepresentation/lack of candor issue against Home stemmed from an apparent conflict in representations concerning the relationship of Todd A. Spoeri to Home and Storer Broadcasting Company. In his affidavit of February 4, 1982, Mr. Spoeri, an 8.33% stockholder of Home, represented that he was given the title of vice

president and general manager of the northeast region of the Cable Communications Division of Storer in November 1981. That statement appeared to contradict an earlier statement made by Mr. Spoeri in a letter to the directors and stockholders of Home dated August 12, 1980, in which he indicated that he had already been appointed to that position. Moreover, in the February 4, 1982 affidavit, Mr. Spoeri indicated that his title of vice president and general manager was an "honorary" position, whereas earlier representations had not been so clarified. Finally, Mr. Spoeri stated in his February 4, 1982 affidavit that, "until recently," he still intended to be employed full time as general manager of the proposed station if Home was granted a construction permit. The statement conflicted with Mr. Spoeri's August 12, 1980 letter in which he notified Home of his resignation as president and general manager.

94. Home's instant application was filed August 3, 1979. At that time, Mr. Spoeri was a director and president of Home. In the application, he was also proposed for full-time employment as the general manager of the new station.

95. In mid-August 1979, Mr. Spoeri obtained full-time employment with Storer as national program manager in its Cable Communications Division. He has been continuously employed with Storer since that time. On September 21, 1979, Home amended its application to report that Mr. Spoeri had joined Storer as its national program manager.

96. In August 1980, Mr. Spoeri received his first promotion at Storer when he was named as the vice president and general manager for the northeastern area of Storer's Cable Communications Division. At that point in time, Storer used the term "northeastern area" to mean the New England states and New York. In his August 12, 1980 letter directed to the directors and stockholders of Home, Mr. Spoeri indicated that he had been appointed to the northeastern area position. However, Home failed to amend its application to report Mr. Spoeri's promotion.

97. Between July and November 1981, Mr. Spoeri received another promotion at Storer when he assumed his present position as vice president and general manager of the northeast region of the Cable Communications Division of Storer. In December 1981, Home did voluntarily report the later promotion.

98. The findings establish that Mr. Spoeri has never been a corporate officer of Storer and his title of vice president is actually "honorary." Moreover, there is a definite difference in the terms "northeast area" and "northeast region" as used by Storer. In the Storer organizational concept, an "area" has always been smaller than a "region." When Mr. Spoeri was responsible for the northeast area, it encompassed essentially the New England states. In his latest position with Storer's northeast region, his responsibilities

involve him in Storer's operations in states north of the Kentucky and Virginia borders, as well as its operations in the New England or Connecticut area. Therefore, the findings establish and it is concluded that Mr. Spoeri occupied three different positions at Storer.

99. It is concluded that there are not irreconcilable differences among the various representations concerning Mr. Spoeri's positions with Storer contained in Mr. Spoeri's August 12, 1980 letter to Home, Home's December 21, 1981 amendment and Mr. Spoeri's February 4, 1982 affidavit. Mr. Spoeri's August 12, 1980 letter accurately noted his appointment to a position in Storer's northeast area, and his latest position with Storer's northeast region was reported in the amendment and affidavit. The fact that Home's December 21, 1981 amendment failed to indicate that Mr. Spoeri's title of vice president and general manager was in fact "honorary" is of no material consequence.

100. The findings of fact also establish that neither Home nor Mr. Spoeri intentionally misrepresented his employment at Home's proposed facility.

101. In August 1980, Mr. Spoeri tendered his resignation as Home's president and proposed general manager. Between August 1980 and February 1981, Herman Goldner had at least one conversation with Mr. Spoeri wherein he asked him to reconsider his resignation. Mr. Spoeri agreed that he would "keep the door open" on the issue of employment.[13] In Mr. Goldner's view, he felt that he could still persuade Mr. Spoeri to become general manager if he made him the right offer in terms of economics.

102. In February 1981, Home filed an amendment to its application which reflected, *inter alia,* that Mr. Spoeri was no longer the president of Home, but that he was still a director. An asterisk next to his name indicated that he would be a full-time employee, but no title was specified. In a reply to an opposition to a petition for leave to file the February 1981 amendment, counsel for Home represented in a footnote that Mr. Spoeri would be the full-time general manager of the station. Mr. Spoeri was completely unaware of this representation and had not discussed the reply or its contents with counsel. He first saw the reply at the hearing. Much of the information that went into the pleading was supplied to counsel through telephone conversations with Mr. Goldner. Mr. Goldner has no recollection of specifically telling counsel that Mr. Spoeri had agreed to be the general manager. He believes that counsel simply accepted what was on the original application as still being true when he prepared the reply. Mr. Goldner did not forward a copy of Mr. Spoeri's resignation to counsel. From the foregoing it is clear that Mr. Spoeri did not

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[13] Although Mr. Spoeri gave conflicting testimony on this subject at the hearing, it is recognized that the first version, though in good faith, was a faulty recollection and that the second version is more reliable, Mr. Spoeri having had his recollection refreshed in looking at telephone records.

misrepresent anything with respect to the reply pleading because he was totally unaware of its existence. There is no evidence in the record upon which to conclude that Home or Mr. Goldner intended to misrepresent Mr. Spoeri's intentions to counsel or the Commission. On the contrary, it appears that counsel simply assumed Mr. Spoeri's intentions were unchanged since the original application, especially in light of the fact that counsel at that time was unaware of Mr. Spoeri's August 12, 1980 letter of resignation. Moreover, the presiding judge accepts Mr. Goldner's representation that, in reviewing the reply, he did not specifically see the footnote or react to it. At the hearing, he acknowledged that he should have reviewed the reply more carefully and clarified the statement, but he disavowed any intention to misrepresent. On these facts it must be concluded that there were no intentional misrepresentations made by Home, Mr. Spoeri or Mr. Goldner.

103. Although it is concluded that Home did not deliberately misrepresent Mr. Spoeri's status with Home, the findings do reflect that Home was negligent in timely reporting changes in its application pursuant to Rule 1.65 in connection with Mr. Spoeri's activities. Specifically, Mr. Spoeri reported to Home in August 1980 his first promotion at Storer and his resignation as president and general manager of Home. The resignation was accepted in September 1980 and J. Eugene Danzey was elected to serve as president. These changes were never reported to the Commission. However, in February of 1981, Home did report that Andre White was then president. Although Mr. Spoeri was listed as an employee of Home, no title was specified. The failure to report Mr. Spoeri's resignation as general manager wasn't crucial in light of the fact that Herman Goldner believed that Mr. Spoeri's decision was not irrevocable and continued to harbor the thought that he would reconsider and resume that position. Furthermore, although Home failed to report Mr. Spoeri's first promotion at Storer, it did voluntarily report his second promotion. In light of the foregoing, the failure in reporting by Home is not deemed to be decisionally significant and Home will only be assessed a slight comparative demerit.

Comparative Issue

104. Home has been found basically qualified and the applicants must now be weighed in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The *Policy Statement* sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public, and (b) a maximum diffusion of control of the media of mass communications. *Policy Statement*, supra, at 394.

Diversification of Control of the Media of Mass Communications

105. *Bay*. Although Bay owns no other media interests, its

principals, Julian S. Smith, Frederick Himes and Robert Simmons, who together have majority control (53.8%) of Bay, also have majority control (52.5%) of CRI, Bay's 39.1% stockholder, which is the licensee of television station WPTT-TV, Pittsburgh, Pennsylvania, and the permittee of television channel 28, Columbus, Ohio. CRI, Julian S. Smith, Frederick Himes, Robert Simmons, Raymond Hoop and B. Stanley Resnick, who together own 96.9% of Bay, also own 96.4% of Chesapeake Television, Inc., licensee of television station WBFF(TV), Baltimore, Maryland. William R. Hoos and H. D. G. Smith each owns less than 1% of Baltimore Radio Show, Inc., licensee of stations WFBR and WBKZ(FM), Baltimore, Maryland.[14] Under the diversification criterion, media holdings in the proposed community of license are generally of most significance, followed by holdings in the remainder of the proposed service area, and then on the regional and national level. *Policy Statement*, *supra*, at 394-95. These holdings, though extensive, are not in or close to the community applied for and, therefore, Bay will receive a moderate rather than a substantial demerit.

106. *Home*. The first issue to be resolved under this criterion is whether the interest of J. Eugene Danzey, a former Home 7.69% stockholder, in station WRXB(AM), St. Petersburg, Florida, should be attributed to Home for comparative purposes. In Home's original application, Home represented that if it were granted a construction permit, Mr. Danzey would divest himself of his interest in WRXB(AM) in order to comply with the Commission's duopoly rules. In its *Designation Order* herein, the Commission gave full credit to Mr. Danzey's representation and, to insure compliance with the duopoly rules, it attached a divestiture condition to any grant of Home's application. After designation, Home amended its application to report that Mr. Danzey had divested himself of all of his interest in Home. The net result is that Home now does not have any stockholders who own a prohibited cross-interest in WRXB(AM). It accomplished in effect what the Commission required of it.[15] The fact that Home accomplished the required end by a mode other than originally indicated is of no consequence. In holding that Mr. Danzey's divestiture of his 7.69% interest in Home is the functional equivalent of his divestiture of his interest in WRXB(AM), no prejudice results to Bay inasmuch as Bay was apprised prior to the cut-off date of the fact that, for comparative purposes, Mr. Danzey's interest in WRXB(AM) would not be attributed to Home because he had agreed to divest himself of his interest in it. Thus, it is concluded

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[14] These interests are deemed insignificant for comparative purposes.

[15] *WHW Enterprises, Inc.*, 89 FCC 2d 799, 51 RR 2d 409 (Rev. Bd. 1982); *Alexander S. Klein, Jr.*, 69 FCC 2d 2134 (Rev. Bd. 1978), *aff'd*, 86 FCC 2d 423 (1981); *Town and Country Radio, Inc.*, 65 FCC 2d 694 (Rev. Bd. 1977), *review denied*, FCC 78-473, released July 7, 1978.

that J. Eugene Danzey's interest in WRXB(AM) cannot be attributed to Home.

107. Robert Gilder, an 8.33% owner of Home, is the senior vice president and general manager of station WTMP(AM), Tampa, Florida. To meet the cross-interest issue first raised in the *Designation Order*, Home filed an amendment containing a letter from Robert Gilder, dated December 7, 1981, stating that upon a grant of Home's application, he would sever all his connections with WTMP(AM). Summary decision was rendered on the cross-interest issue by *Memorandum Opinion and Order* FCC 82M–0993, released March 30, 1982. Although it is clear that Mr. Gilder will have no control over WTMP(AM) if Home is granted a construction permit, Bay argues that Mr. Gilder's interest in WTMP(AM) must be counted against Home under the diversification criterion since he did not propose to divest that interest until after the designation. Home will be assessed a comparative demerit. However, in view of Robert Gilder's minority interest (8.33%) in Home, and in view of the fact that he is not proposed for any management position at Home, the demerit will be very slight.

108. Todd Spoeri, an 8.33% stockholder in Home, owns stock in Storer Broadcasting Company and Gulf United Corporation in amounts of .0093% and .0026%, respectively. This interest in two publicly-held corporations is *de minimis* and will not be held against Home for comparative purposes.

109. Robert Ruark, an 8.33% stockholder in Home, owns 55% of the stock of International Broadcast Consultants, Inc. IBC owns 100% of the stock of Dana Broadcasting Corporation, which in turn owns 75% of Video Entertainment Corporation, the proposed assignee of a permit for television station WULT, New Orleans, Louisiana. The Commission has granted its consent to this assignment, but the parties have not yet consummated the transaction. Since the assignment of the permit has not taken place, the inchoate interest of Robert Ruark will not be held against Home. Mr. Ruark, through his ownership in IBC's wholly-owned subsidiary, Montage Corporation, has an ownership interest in Storm Broadcasting Corporation, permittee of WHFL(FM), Havana, Florida. Montage owns 49% of Storm. Havana is north of Tallahassee, which is over 250 miles from St. Petersburg. Considering the nature of the interest, its location and the fact that Mr. Ruark is an 8.33% owner of Home, Home will be assessed only a very slight demerit.

110. In summary, Robert Ruark's and Robert Gilder's respective holdings in other media interests, taken together, amount to only a very slight demerit. Home, therefore, will be awarded a moderate diversification preference over Bay.

Best Practicable Service to the Public

111. In determining which applicant will insure the best practi-

cable service to the public, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners, including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement, supra,* at 395. The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full time, the credit drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id.* Substantial time is deemed to be in excess of twenty hours per week. *Midwest Broadcasting Company,* 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied,* FCC 79–397, released June 22, 1979.

112. Bay will integrate into part-time management positions Julian S. Smith, Frederick M. Himes, Robert L. Simmons and Julian Duncan Smith. Julian S. Smith, a 49.9% shareholder, will serve as a part-time general manager. Frederick Himes, a 3.9% stockholder, will be a part-time station manager. Robert Simmons, Bay's officer and director, will serve as a part-time general sales manager; and Julian Duncan Smith will serve as a part-time technical director. Neither Robert Simmons nor Julian D. Smith are stockholders of Bay, although they are stockholders of CRI, which is a 39.1% Bay stockholder.[16] Each of the aforementioned individuals will work a minimum of twenty hours per week. Julian S. Smith, Frederick Himes and Robert Simmons will not move to the St. Petersburg area, nor will they work on a daily basis. Their work effort will be compressed into a two-day period. Each of them has full-time management responsibilities at other station locations. Their part-time participation is enhanced, however, by virtue of their extensive broadcast experience.[17]

113. Home will integrate Andre M. White, Herman W. Goldner and F. Jeffrey Rahall, each a 7.69% stockholder, for a total of 23.07% full-time integration into management. Andre White will serve as president and director of community relations; Herman Goldner will serve as director of news and business services; and F. Jeffrey Rahall

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[16] Julian D. Smith is not an officer, director or stockholder of Bay. His interest in CRI is very small. Under the *Policy Statement,* his integration into the management of Bay does not fulfill the Commission's criterion that legal responsibility and day-to-day performance be closely associated. Hence, no integration credit is allowed for Julian D. Smith's participation.

[17] The *Policy Statement* makes clear that previous broadcast experience, as an attribute of participating owners, is of only minor significance since emphasis upon this element could discourage qualified newcomers to broadcasting and since experience confers only an initial advantage. 1 FCC 2d at 396. *See also Webster-Baker Broadcasting Co.,* 88 FCC 2d 944, 951–52, 50 RR 2d 1142, 1148 (Rev. Bd. 1982).

will serve as comptroller. Mr. White's participation is enhanced by virtue of his minority status, local residency, civic participation and previous broadcast experience. Mr. Goldner's participation is enhanced by his local residence and civic participation. Mr. Rahall's participation is enhanced by his local residence.

114. In sum, Home is entitled under the integration criterion to a moderate preference quantitatively and to a clear preference qualitatively. Bay's part-time integration of three of its principals representing 53.8% of ownership is enhanced only by past broadcast experience.[18] Home's full-time integration of three of its principals representing 23.07% of ownership is enhanced in varying degrees by four different attributes.

Final Comparative Evaluation

115. Home has received a moderate diversification preference over Bay, and Home's integration proposal deserves a moderate preference over Bay's. Home, on the other hand, has received a slight comparative demerit for its failure to report timely to the Commission the resignation of one of its principals as officer/director/general manager of the proposed station. When the preferences and demerit are weighed, Home is the winner. It is, therefore, concluded that a grant of Home's application will better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Initial Decision on its own motion in accordance with Section 1.276 of the Rules, the application of Home TV, Incorporated for a construction permit to build and operate a new UHF television station on channel 38 at St. Petersburg, Florida IS GRANTED and the application of Bay Television, Inc. IS DENIED.[19]

FEDERAL COMMUNICATIONS COMMISSION
JOHN M. FRYSIAK, *Administrative Law Judge*

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[18] Credit was given for Robert Simmons' participation, although he is not an owner of Bay except derivatively. However, considering his rather small derivative holding, the credit given is slight.

[19] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Reconsideration, Petition for, Denial of

Reconsideration denied where no new legal argument was presented and new factual material would have been discovered, through excercise of due diligence, at time of hearing.
–Beaufort County B/cing Company
BC Docket No. 80–775

FCC 83R–73

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of Carmen D. Trevitt and Calvin D. Means d/b/a BEAUFORT COUNTY BROADCASTING COMPANY Beaufort, South Carolina	BC Docket No. 80–775 File No. BPH-790918AC
BARNACLE BROADCASTING LTD. Port Royal, South Carolina	BC Docket No. 80–776 File No. BPH-800519AF
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted: September 26, 1983; Released: September 29, 1983)

BY THE REVIEW BOARD:

1. In a Decision, FCC 83R-51, released July 22, 1983, the Review Board held that Section 307(b) of the Communications Act required a grant of Barnacle Broadcasting Ltd.'s application for authority to construct a new FM station in Port Royal, South Carolina because that community did not have its own local station. We also rejected the belated and unprecedented attempt by Beaufort County Broadcasting Company, the applicant who had originally applied to build the station in Beaufort, South Carolina, to amend to change its station location to Port Royal. Now before the Board is a petition for reconsideration, filed August 22, 1983, by Beaufort County.[1]

2. We will deny this petition. Although Beaufort County pur-

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[1] Related pleadings before the Board are an opposition filed September 6, 1983 by Barnacle and a reply filed September 19, 1983 by Beaufort County.

ports to state a new legal argument—namely, that both applicants propose identical service from different cities in the same region and therefore must be viewed as serving the same "community"—this contention has in fact been made throughout this proceeding. *See, e.g.*, Beaufort County exceptions, page 4; reply brief, page 4, n.3; and oral argument, Tr. 1172. And it was expressly considered in our Decision, at paras. 10–11. We will not grant reconsideration merely to rehash the same matter again. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co.* v. *FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Moreover, Beaufort County's reliance on recently obtained 1980 U.S. Census Bureau data pertaining to Beaufort and Port Royal to support its argument is inappropriate because, through the exercise of ordinary diligence, it could have discovered this information at the time of the hearing. *See* Section 1.106(b) and (c) of the Rules. In fact, its own hearing exhibits contained 1980 population figures. *See I.D.*, para. 52. Finally, Beaufort County's reliance on the only authority not previously cited, a recent Notice of Proposed Rulemaking in MM Docket No. 83–403, 48 Fed. Reg. 19428, published April 29, 1983, is unavailing, first, because the Notice, of course, states merely a proposal and, second, because whatever its ultimate outcome, it has not been shown to specifically undermine the result reached in our Decision.

3. ACCORDINGLY, IT IS ORDERED, That the petition for leave to file amendment, filed August 26, 1983, by Barnacle Broadcasting Ltd. IS GRANTED, and the amendment IS ACCEPTED; and

4. IT IS FURTHER ORDERED, That the petition for reconsideration, filed August 22, 1983, by Beaufort County Broadcasting Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

Comparative Issue
Ownership and Management, Integration of

> **Application to construct FM station granted. Principal's integration proposal will be credited because contract to work at another proposed station was conditional upon settlement of instant proceeding and withdrawal of application, which events did not occur.**
> **–*B & M Communications, Inc.***
> **BC Docket No. 82–56**

FCC 83R–74

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of B & M COMMUNICATIONS, INC. Mountain Home, Arkansas	BC Docket No. 82–56 File No. BPH-800918AC
MOUNTAIN-VALLEY BROADCASTERS, INC. Mountain Home, Arkansas	BC Docket No. 82–57 File No. BPH-819204AB
DR. AMBROSE T. WALKER, M.D. Mountain Home, Arkansas	BC Docket No. 82–58 File No. BPH-810210AD
For Construction Permit for a New FM Station	

Appearances

Marvin Rosenberg and *David G. Rozzelle*, on behalf of Mountain-Valley Broadcasters, Inc.; and *Lawrence J. Bernard, Jr.*, on behalf of B & M Communications, Inc.

DECISION

(Adopted: September 28, 1983; Released: October 6, 1983)

BOARD MEMBER BLUMENTHAL FOR THE REVIEW BOARD:

1. This proceeding involves the mutually exclusive applications of B & M Communications, Inc. (B&M) and Mountain-Valley Broadcasters, Inc. (MVB) for authority to construct a new FM

broadcast station in Mountain Home, Arkansas. By *Hearing Designation Order*, Mimeo No. BC 1939, released February 3, 1982, the applications were designated for hearing on a standard comparative issue.[1] In an Initial Decision (*I.D.*), FCC 83D-25, released April 18, 1983, Administrative Law Judge (ALJ) John H. Conlin determined that B&M was the preferred applicant on the basis of its superior integration proposal which outweighed a very slight coverage preference to MVB. This proceeding is now before the Review Board on exceptions filed by MVB. We have reviewed the *I.D.* in light of the exceptions, B&M's reply brief, the oral argument held July 7, 1983, and the record. We adopt the ALJ's findings of fact, except as modified herein, and affirm his ultimate conclusion that a grant of B&M's application will best serve the public interest.

2. As the *I.D.* observes, the key to this case is the full-time integration proposal of B&M's largest stockholder, Alfred B. Pickworth.[2] If that proposal is credited, then B&M is entitled to a modest but nonetheless decisional advantage under the criteria of our *Policy Statement on Comparative Broadcast Hearings*.[3] MVB would have us reverse the *I.D.*'s accreditation of Pickworth's personal integration proposal, however, based on the evidence of a written contract he entered with his B&M co-principals to work for a potential FM radio station in Stuttgart, Arkansas, an application for which those same co-principals (but not Pickworth) had filed d/b/a Riceland Communications, Inc. ("Riceland").[4] MVB argues that Pickworth's employment contract with the Stuttgart applicant reflects the fact that he voluntarily withdrew from the B&M application (at least temporarily and insofar as the integration aspect) and that the ALJ's acceptance of Pickworth's original B&M integration proposal resulted in an impermissible "upgrading." B&M responds that the Pickworth/Riceland employment contract was executed at a time when settlement of the instant case appeared imminent and was implicitly conditioned on such settlement.

3. After reviewing the record concerning this matter, we are in complete agreement with the ALJ, and we find that MVB's argument on this matter is superficial and unpersuasive. We need no lengthy opening discussion on the law of contracts to observe that

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[1] The application of Dr. Ambrose T. Walker, M.D., which was also consolidated for hearing, was denied in the *I.D.* and Dr. Walker has not filed exceptions. Therefore, his application is dismissed. Section 1.276(f) of the Rules, 47 CFR §1.276(f).

[2] *I.D.*, para. 16.

[3] *See* 1 FCC 2d 393, 395–96 (1965). Thus, the ALJ's reading of our comparative policy (*see I.D.*, paras. 18, 26) is correct.

[4] The 64.9% principals of B&M (all, in fact, excluding Pickworth) were, at times relevant herein, 75% stock subscribers to the application of Riceland Communications, Inc., FCC Dkt. No. BC 82–633 *et al. See I.D.* at n.1. The Stuttgart FM comparative proceeding remains, so far as we are informed, *sub judice*.

they are to be interpreted so as to reflect - to the extent that it may be discerned - the intentions of the parties.[5] It is clear on this record that Pickworth's contract with Riceland was (1) implicitly (or constructively) conditioned on the settlement of this proceeding[6] and (2) expressly conditioned on the success of Pickworth's co-principals in acquiring the Stuttgart construction permit. Corroborative circumstances aside, we note the fact that all parties to the Pickworth/Riceland contract (hence, B&M) aver without the slightest contradiction that the subject agreement was intended to take effect only as a consequence of settlement of this case,[7] and even MVB does not promote a contrary construction. Indeed, MVB concedes:[8]

> It must be remembered that at the time Pickworth entered into the Stuttgart contract, the other principals in B&M were stockholders in Riceland. . . . Therefore, in retrospect, it seems logical to assume that the group decided to settle the Mountain Home proceeding and focus their energies on the Stuttgart proposal.

Thus, it is undisputed that Pickworth's contract with his co-principals to join the Stuttgart operation was wholly premised on a prospective settlement and withdrawal by B&M. Pickworth and his co-principals, by obvious mutual assent, consider Pickworth's "back-up" contract with Riceland a substantive nullity; and so do we.[9] Because the only "interruption" of Pickworth's B&M integration proposal was both conditional (on settlement herein) and entirely abstract, this situation is plainly distinguishable from that appertaining in *Florida Georgia Television Co., Inc.*,[10] on which MVB chiefly relies.[11] In that case, the proposed president of the applicant entity actually left the applicant and informed the Commission that, having accepted the position of Director of the Office of Emergency Planning, he would not participate in the application or station. 12 FCC 2d at 883. His stock was transferred and a new principal substituted. Some six months later, but after cut-off and hearing designation, the original principal sought reinstatement, but the Board refused. *Id.*, at 884. Here, Pickworth never withdrew from B&M (such withdrawal being contingent on the condition of settlement) and no "reinstatement" is therefore required.

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[5] *See generally* CORBIN ON CONTRACTS §§536–538 (1960).

[6] *See I.D.*, paras. 20–24.

[7] Professor Corbin's treatise states:

> In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. * * * In cases so numerous as to be impossible of full citation here, the courts have held that evidence of practical interpretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given.

CORBIN *supra*, §558 (Practical Interpretation and Application of the Contract by the Parties Thereto).

[8] MVB Br. at 8.

[9] For additional insight into the operative principles of contract law at work here, *see* CORBIN, *supra*, §565 (The "Implication" of Conditions and Promises in the Field of Impossibility and Frustration).

[10] 12 FCC 2d 883 (Rev. Bd. 1968).

[11] *See* MVB Br. at 9–11.

4. To be certain, B&M could have avoided this clamor by the simple expedient of a written clause expressly conditioning the Riceland contract on the successful settlement of the B&M case; at failure of settlement, the contract would have been negated by its terms and no interpretative argument as to Pickworth's continuous status in the B&M application could have been interposed. However, inasmuch as the direct and circumstantial evidence clearly affirms that Pickworth did not in any sense abandon B&M, we will not penalize him or B&M collectively for the careless draftsmanship which is the proximate cause of this little excitement. Nor will we put a disqualifying premium on B&M's attempt to settle this case or on Pickworth's natural desire to assure an alternative livelihood in anticipation of settlement, and to secure that obvious desire by contract. MVB, which was party to the failed Mountain Home settlement,[12] cannot now claim ignorance of the prevailing circumstances or actual prejudice to its comparative position. Its exceptions on this matter are firmly rejected.[13]

5. MVB also excepts to the ALJ's ruling in *Memorandum Opinion and Order*, FCC 82M-2058, released July 2, 1982, wherein he declined to add misrepresentation and reporting issues against B&M. Specifically, it alleges that an issue going to the *bona fides* of B&M's ascertainment survey should have been specified based on MVB's submission of affidavits from four community leaders alleging that they did not recall being interviewed by B&M regarding community needs. We disagree, for it appears that B&M's application lists 47 leaders as having been interviewed, that one of the challenged leaders subsequently submitted an affidavit stating that he was in fact interviewed, and that B&M produced a sworn statement from a prospective employee attesting that she absolutely contacted the other three leaders. MVB Br. at 18. Thus, at most, 3 out of 47 interviews (or approximately 6% of the total) are in any conceivable doubt. The ALJ properly and within his discretion held that where,

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[12] MVB Br. at 3–4. Therein, MVB claims that Pickworth backed away from the settlement. It does not dispute that the settlement was reasonably anticipated or the underlying premise for Pickworth's contract with Riceland.

[13] We also reject MVB's related claim that Pickworth's qualitative enhancement for broadcast experience should not be credited. In view of the clear quantitative advantage B&M enjoys, qualitative factors are decisionally unimportant here. *See Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506 (Rev. Bd. 1982).

as here, only a negligible percentage of community leader interviews are challenged in some possible way, a misrepresentation issue is not automatically warranted. *See Radio Laredo, Inc.*, 87 FCC 2d 353, 357 (Rev. Bd. 1981), and cases cited therein. Under the facts and circumstances here, we find no significant or material questions and affirm the ALJ. Next, MVB alleges that the ALJ erred in not adding a misrepresentation issue based on B&M's submission to the Commission of two bank commitment letters as part of its financing plan when it apparently intended to rely on funding from another source and had so advised the banks at the time. Although, as the ALJ iterated, it would have been more appropriate for B&M to have adverted in its application to its plan to later seek alternative financing, there is no evidence suggesting that B&M misled the Commission as to the availability of necessary funds at the time it asserted that it had the financial commitment necessary for qualification. B&M submitted unchallenged affidavits from officials of the two lending banks stating unequivocally that at the time the commitment letters were written, the banks were willing and able to lend the funds under the terms and conditions set forth therein. Consequently, this case differs completely from *Orange County Broadcasting Co.*, 37 FCC 2d 794 (Rev. Bd. 1972), which MVB relies on as "virtually . . . identical." MVB Br. at 21. There the legitimacy of a purported commitment was in issue whereas, here, the willingness of the original banks to commit the funds is not in arguable doubt. In sum, while B&M's reportorial handling of this matter is troublesome and might even warrant some slight demerit under the standard of complete and absolute candor, MVB's protestations fall far short of raising any factual issue regarding B&M's basic qualifications that would justify remand of this proceeding or a decisional penalty. We therefore conclude, as did the ALJ, that B&M's comparative superiority entitles it to a grant of its application and we affirm the grant to it.[14]

6. ACCORDINGLY, IT IS ORDERED, That the motion for acceptance of addendum to reply, filed June 3, 1983, by B & M Communications, Inc., IS GRANTED; and

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[14] Only brief comment is required on two other matters raised by MVB. First, MVB argues that a Section 1.65 issue should have been added based on B&M's failure to timely amend its application to report its connection with the Riceland application. The filing of the Riceland application was voluntarily reported, however, on April 27, 1982, and that application reflected the filing of B&M's application; moreover, in view of our previous discussion (paras. 2–4, above), it is apparent that this omission was not decisionally significant and thus no issue was called for. Second, MVB argues that "if the case is remanded for further proceedings," we should reverse the ALJ's ruling at the hearing and permit it to introduce deposition testimony of Alfred Pickworth to impeach his hearing testimony. MVB Br. at 29. The short answer is that we are not remanding; but, in any case, we disagree that the ALJ improperly restricted counsel's examination of Pickworth, *see* Tr. 49–62, or that in view of our earlier discussion of the Riceland matter, further hearing on this score would be productive.

7. IT IS FURTHER ORDERED, That the application of B & M Communications, Inc. to construct a new FM station in Mountain Home, Arkansas, IS GRANTED; the application of Mountain-Valley Broadcasters, Inc., IS DENIED; and the application of Dr. Ambrose T. Walker, M.D., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

FCC 83D-25

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
B & M COMMUNICATIONS, INC. Mountain Home, Arkansas	BC Docket No. 82-56 File No. BPH-800918AC
MOUNTAIN-VALLEY BROADCASTERS, INC. Mountain Home, Arkansas	BC Docket No. 82-57 File No. BPH-810204AB
DR. AMBROSE T. WALKER, M.D. Mountain Home, Arkansas	BC Docket No. 82-58 File No. BPH-810210AD
For Construction Permit for a New FM Station	

Appearances

Paul A. Zevnik and *Lawrence J. Bernard, Jr.*, on behalf of B & M Communications, Inc.; *David G. Rozzelle* and *David N. Sternlicht*, on behalf of Mountain-Valley Broadcasters, Inc.; *Aaron P. Shainis* and *Clifford J. Bond*, on behalf of Dr. Ambrose T. Walker; and *Allan Moskowitz*, on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued April 8, 1983; Released April 18, 1983)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of B & M Communications, Inc. (B&M), Mountain-Valley Broadcasters, Inc. (MVB) and Ambrose T. Walker, M.D. (Walker) for a construction permit for a new FM broadcast station on Channel 288A in Mountain Home, Arkansas. The applications were designated for hearing on the following issues:

1. To determine with respect to B&M:

(a) the source and availability of additional funds over and above the $51,661 indicated;

(b) whether, in light of the evidence adduced pursuant to (a) above, the applicant is financially qualified.

2. To determine with respect to MVB:

(a) the source and availability of additional funds over and above the $103,095 indicated;

(b) the costs of leasing, acquiring, remodeling, and/or constructing buildings; and

(c) whether, in light of the evidence adduced pursuant to (a) and (b) above, the applicant is financially qualified.

3. To determine whether there is a reasonable possibility that a hazard to air navigation would occur as a result of the tower height and location proposed by Mountain-Valley Broadcasters, Inc.

4. To determine which of the proposals would, on a comparative basis, best serve the public interest.

5. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

In orders (FCC 82M-1235 and FCC 82M-1236) released April 19, 1982, the presiding officer deleted the air hazard issue (issue 3) against MVB and resolved the financial issue (issue 2) in MVB's favor. In an order (FCC 82M-2137) released July 9, 1982, the financial issue specified against B&M (issue 1) was resolved in the applicant's favor.

2. A prehearing conference was held on April 14, 1982 and a hearing session was held on July 14. Proposed findings of fact and conclusions of law were filed by the applicants on September 15, 1982 and reply findings and conclusions were filed on September 29. The record was closed on October 14, 1982 (FCC 82M-3220, released October 18, 1982).

Findings of Fact

The Applicants

3. *B&M.* B&M is an Arkansas corporation with the following stockholders, officers and directors:

Name	*Stock Interest*	*Office*	*Director*
Alfred B. Pickworth	35.1%	President	*Yes*
James L. Reinhart	28.4%	Vice President	*Yes*
James D. Lewis	28.4%	Secretary-Treasurer	*Yes*
William K. Lawrence, Jr.	8.1%	None	*No*

Neither B&M nor any of its principals hold an interest in any medium of mass communications.[1]

4. In the event of a grant of the B&M application, Alfred B.

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[1] Messrs. Reinhart, Lewis and Lawrence were each subscribers to 25% of the common stock of Riceland Communications, Inc., an applicant for a new FM station to serve Stuttgart, Arkansas (B&M Ex. 1, pp. 1–2). That application was recently dismissed by the presiding officer in the Stuttgart proceeding (*Chudy*

Pickworth proposes to become the full-time general manager of the proposed station. He will be responsible for all facets of station operation, including supervision of day-to-day programming and all of the station's employees. As a director of the licensee, he will participate in the formation of station policies, and as its president, he will be responsible for the day-to-day implementation of policies adopted by the board of directors (B&M Ex. 2, p. 2; Tr. 73).

5. Pickworth has held a number of positions in the broadcast field. From August of 1947 through January 1951, he was employed by radio station KGHI in Little Rock, Arkansas as an announcer and salesman. From January 1951 through February 1956, he worked at stations KTHS(AM) and KTHV-TV in Little Rock as an announcer and as a member of the production staff. From March 1956 through February 1964, Pickworth was employed by stations KCMO-AM, FM and TV in Kansas City, Missouri where he worked on special events, production and as an announcer. Between September 1966 and December 1966 and again from December of 1977 through September of 1979, he worked at radio station KADL, Pine Bluff, Arkansas in annoucing, sales and production. From January 1967 through April 1967, he worked as a salesman at radio station KARK in Little Rock. From April 1967 through October 1971, he was employed at AM station KTLO in Mountain Home, Arkansas in sales, production and announcing. From October 1972 through January 1973, he worked at television station KMTC-TV in Springfield, Missouri as an announcer, producer and salesman. Finally, from February 1980 through June 1980, he served as the assistant to the general manager of radio station KCLA in Pine Bluff. In July 1980, he returned to Mountain Home where he now resides (B&M Ex. 2, p. 1).

6. *MVB.* MVB is an Arkansas corporation structured as follows:

Name	*Office*	*Stock Owned*
Allen S. McGaughey	President, Director	99%
Alison A. McGaughey	Secretary-Treasurer, Director	—
Bruce I. Higgins	None	1%

7. Allen McGaughey is a resident of Mountain Home, Arkansas and is a practicing ophthalmologist. He has a distinguished academic background and has published a number of papers in his field of medicine. He has no other broadcast interests nor does he have any broadcast experience. He is a co-founder (with his wife Alison) of the North Arkansas Council for the Arts and has lectured before civic groups and service organizations. McGaughey proposes to devote at least 20 hours a week to the operation and management of MVB's

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Broadcasting Corporation, Docket No. BC 82–633, et al., *Order* released January 3, 1983). An appeal is now pending before the Review Board.

station (MVB Ex. 1, p. 2). He intends to oversee the decisions of the station's general manager,[2] set broad station policies and pay particular attention to financial matters (*id.*)

8. *Walker*. Dr. Ambrose T. Walker has applied as a sole proprietor. He has no other interest in any medium of mass communication (Walker Ex. 1, p. 3).

9. Walker proposes to devote 20 hours per week to the management of his Mountain Home station. He was born and raised in Arkansas and presently resides in Thayer, Missouri, where he has practiced medicine for more than 30 years (Walker Ex. 1, p. 1). Thayer is about 60 miles northeast of Mountain Home.

10. In addition to his medical practice, Walker has been a major stockholder in Shipp Services, Inc. (building and small loan business), a partner in a local service station and car wash establishment, a partner in a wholesale drug business and a major stockholder in Mammoth Spring Distributing Company, Inc. (candy and tobacco sales). He also supervises various rental property which he owns, and operates a cattle farm near Thayer which he also owns.

11. Walker proposes to purchase and have installed both at the studio and transmitter locations emergency power generation equipment capable of providing normal operational capabilities to the proposed station in the event of commercial power disruptions.

Areas and Populations Served

12. The applicants will serve the following areas and populations, respectively (Joint Ex. 1, p. 7):

	Population	*Area (sq. mi.)*
MVB		
ERP 0.794 kW at 585 feet AAT 1 mV/m contour	30,549	632
Not served by Walker	2,430	124
Not served by B&M	520	78
Walker		
ERP 1.0 kW at 480 feet AAT 1 mV/m contour	28,951	608
Not served by MVB	832	100
Not served by B&M	Negligible	Negligible
B&M		
ERP 1.13 kW at 457 feet AAT 1 mV/m contour	30,951	658
Not served by MVB	922	104
Not served by Walker	2,000	50
Common to MVB, Walker and B&M	28,119	508

13. None of the applicants proposes to serve daytime white or grey areas (Joint Ex. 1, p. 8). Walker's proposal will not serve any

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[2] Originally Bruce Higgins was to be the general manager. This proposal was later withdrawn, and the applicant now proposes to hire a general manager.

nighttime white area or grey area (Joint Ex. 1, p. 9). MVB and B&M will serve nighttime white and grey areas as described in the following table (Joint Ex. 1, p. 9):[3]

Number of Other Services	*MVB*		*B&M*	
	Population	*Area (sq. mi.)*	*Population*	*Area (sq. mi.)*
0	197	27	87	6
1	247	26	121	6
2	74	19	2	1
3	0	0	13	2
4	0	0	1	1

14. In sum there would be no service to white or grey areas during the daytime. At night, MVB proposes white area service to 197 persons within 27 square miles. B&M proposes white area service to 87 persons within 6 square miles. Walker proposes no white area service. Similarly, MVB proposes grey area service to 247 persons within 26 square miles. B&M proposes grey area service to 121 persons within 6 square miles. Walker proposes no grey area service. In terms of total service, MVB proposes to provide 1 mV/m service to 30,549 persons within 632 square miles. B&M proposes to provide 1 mV/m service to 30,951 persons within 658 square miles. Walker proposes to provide 1 mV/m service to 28,951 persons within 608 square miles.

Comparative Analysis

15. None of the applicants has ownership ties to existing media of mass communications and thus none is entitled to a preference under the comparative issue. Of the three, only Walker proposes an auxiliary power source; the applicant is thus entitled to a "very slight" preference. *New Continental Broadcasting Co.*, 88 F.C.C. 2d 830, 851 (Rev. Bd. 1981). As to comparative coverage, the record shows that the applicants propose to serve essentially the same areas and populations. Both B&M and MVB are entitled to a preference over Walker since they will serve somewhat larger populations (2,000 more in the case of B&M, 1,598 in the case of MVB) and will provide some service to white and grey areas, whereas Walker will not. As between B&M and MVB, B&M would serve 402 more people and MVB would bring a first aural service to 110 more people and a second service to 126 more. In view of the priority traditionally attached to providing service in white or grey areas, MVB will be

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[3] The table does not reflect the construction permit to increase power (BPH-811016AH) recently granted to KHOZ-FM, Harrison, Arkansas. In taking official notice of this action (FCC 82M-2721, released September 8, 1982), the presiding officer invited the parties to submit a supplemental engineering exhibit updating the data contained in Joint Ex. 1. They chose not to do so and accordingly that exhibit is relied on for findings on comparative coverage.

preferred though the preference is a very small one because of the relatively small populations involved in the comparison.

16. The most decisionally significant aspect of this case is the applicants' integration of ownership with management. B&M proposes the full-time participation of its largest (35.1%) stockholder, Alfred B. Pickworth, who would serve as general manager of the proposed station. MVB's 99% owner, Dr. Allen McGaughey, proposes to oversee the operation and management of its station on a part-time basis, devoting 20 hours per week to this task. Walker's sole owner, Dr. Ambrose T. Walker, proposed to do likewise. Each applicant has made the customary challenges to the acceptability of its adversaries' proposals, and these will now be considered.

17. *Walker*. B&M and MVB contend that Walker's proposal to devote 20 hours per week to the management of the Mountain Home station must be rejected since it cannot be reconciled with other record evidence. The presiding officer agrees. Dr. Walker lives 60 miles from Mountain Home, in the town of Thayer, Missouri. He has a medical practice which he conducts without partners or associates. He owns and operates a cattle farm nearby and supervises other properties he owns there. He has also been involved in numerous business ventures and is active in the affairs of his church and several service organizations (Walker Ex. 1).

18. The *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965), states, at 395, that "no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." Walker has made no attempt to show how his current business, professional and other activities could or would be adjusted in a way that would allow him to achieve this minimum standard. In light of these activities and the fact that he resides 60 miles from Mountain Home, a mere claim that he intends to devote 20 hours per week to the affairs of the station is not sufficient to establish that his proposal is a realistic one. See *Blancett Broadcasting Co.*, 17 F.C.C. 2d 227 (Rev. Bd. 1969); *Lewis Broadcasting Corp.*, 11 F.C.C. 2d 889 (Rev. Bd. 1968). Walker might well devote some personal attention to the proposed station, but on the basis of the record daily involvement amounting to at least 20 hours per week seems most unlikely, particularly in the absence of any showing to the contrary.

19. *MVB*. Like Ambrose Walker, Allen McGaughey is a doctor. His practice, largely involving eye surgery, takes up about 30 hours per week (Tr. 101). The practice is shared with two other doctors (Tr. 107) and his schedule affords him considerable free time (Tr. 102). In addition MVB's proposed studio will be located on property adjacent to McGaughey's residence, making it relatively easy for him to be physically present at the station on a regular basis. In the circumstances the presiding officer sees no reason to question his proposal to devote 20 hours per week to overseeing the operation of the

station, which will be under the immediate direction of a general manager to be hired by MVB. Nor does the record contain any other evidence to discrediting his integration.

20. *B&M*. The other applicants contend that Alfred Pickworth's full-time commitment should not be credited because he has entered into a contract with Riceland Communications, Inc. to become general manager of a station in Stuttgart, Arkansas, should Riceland be successful in obtaining a construction permit.

21. The circumstances surrounding Pickworth's employment contract with Riceland are these. In August 1981, negotiations were undertaken among the three applicants in this proceeding looking towards a settlement under which B&M would dismiss its application. At the same time, three of B&M's principals, Lewis, Reinhart and Lawrence, became principals in Riceland which proposed to file an application for permission to construct a new FM broadcast station at Stuttgart, Arkansas. Although Pickworth did not have an interest in Riceland, he assisted in the preparation of the application (Tr. 31) and signed an agreement with the applicant to become its general manager in the event the application was granted (MVB Ex. 3). Pickworth testified that he entered into the agreement on the assumption that B&M's Mountain Home application would be dismissed and advised the Riceland principals that he would be available only on that basis (Tr. 43–46, 48–49).

22. Subsequently, in April 1982, settlement negotiations were terminated without a final agreement being reached, and Pickworth advised Riceland that he could no longer commit himself to become general manager of the Stuttgart station (Tr. 48–49). At the hearing in this case, held in July 1982, Pickworth testified that he intended to devote 40 hours per week to his duties as general manager of the proposed Mountain Home station (B&M Ex. 2, p. 2; Tr. 73). In January 1983 the Riceland application was dismissed (n. 1, *supra*), but since an appeal from that action is now before the Review Board the status of the application is uncertain. However, the weight of the evidence in this proceeding is that Pickworth intends to fulfill his commitment to B&M, and the contention of the other parties that he will be unable to do so because of his commitment to Riceland is rejected as speculative.[4]

23. It is also contended that in weighing B&M's integration

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[4] MVB also asserts that Pickworth's termination of the employment contract occurred after the "B" cut-off date and that to the extent it removed an impediment to fulfilling his integration commitment, it improperly improved his comparative position. However, B&M's integration proposal is in fact unchanged. Whether the B&M application should have been amended to reflect the employment agreement with Riceland and should have been amended again to "reinstate" Pickworth, as MVB contends, is perhaps arguable. However, there is no Section 1.65 issue in the case, and the testimony shows that Pickworth's primary allegiance throughout was to the Mountain Home application.

Pickworth's broadcast experience is a negative rather than a positive factor. Both MVB and Walker argue that his many changes in employment (para. 5, *supra*) indicate a lack of stability and that his failure to achieve a significant managerial position after so many years in broadcasting raises a question as to his competence. These assertions are purely speculative and will not be credited.

24. In sum Pickworth's proposal to work full time at the station is a realistic one; and the fact that he once agreed to become general manager of Riceland's proposed station in another community does not, under the circumstance of this case, affect the credibility of that proposal. B&M will therefore be credited with 35.1% fulltime integration.

25. *Ultimate Findings*. For reasons previously discussed, Walker's proposed part-time participation in station affairs will not be credited. As between the remaining applicants, MVB will be credited with the part-time participation of its 99% stockholder Allen McGaughey. This integration is enhanced by his local residence and, to a lesser extent, his participation in civic affairs. B&M's 35.1% full-time integration is enhanced by Pickworth's local residence and by his considerable broadcast experience in sales, announcing and production. In weighing these proposals emphasis, of course, is placed on full-time participation, with credit dropping "sharply" as the amount of time committed to the station recedes. *Policy Statement, supra*, at 395; *New Continental Broadcasting Co., supra*, at In the present case Pickworth's commitment to work full time in the key position of general manager, where he will directly supervise all aspects of the station's operation, is regarded as far more meaningful than McGaughey's part-time proposal to exercise general oversight functions. B&M is therefore entitled to a preference in this area of comparison.

Conclusions

26. The only issue in this case is the standard comparative issue. B&M has received a preference for its superior integration of ownership with management. MVB has received a very slight preference for its coverage proposal and Walker a very slight preference for its emergency power equipment. The strength of B&M's preference and the fact that the area of preference, integration of ownership with management, is of "substantial importance"[5] under the comparative issue warrant the selection of B&M as the applicant whose proposal best serves the public interest.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of B & M Communications, Inc. for a

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[5] *Policy Statement, supra.*

permit to construct a new FM station in Mountain Home, Arkansas IS GRANTED and the applications of Mountain-Valley Broadcasters, Inc. and Dr. Ambrose T. Walker for the same facility ARE DENIED.[6]

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

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[6] In the event exceptions are not filed *within 30 days after the release of this Initial Decision*, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

CATV Program Exclusivity, Network Programming
Forfeiture
Rules, Waiver of

Waiver of network program nonduplication rules granted. Petitioning cable systems demonstrated projected audience loss to station of only 3.24%. Forfeiture for alleged failure to provide protection pursuant to the rules denied.
–Community Tele-Communications, Inc.

FCC 83–435

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
COMMUNITY TELE-COMMUNICATIONS INC.	**CSR-2116**
d/b/a SCOTTS BLUFF CABLE TV	**CF-34**
Scottsbluff, Nebraska	**NE0006**
Terrytown, Nebraska	**NE0043**
Gering, Nebraska	**NE0042**
Scotts Bluff County, Nebraska	**NE0051**
Petition for Special Relief	
Petition for Forfeiture	

MEMORANDUM OPINION AND ORDER

(Adopted: September 22, 1983 Released: October 14, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO DISSENTING; COMMISSIONER DAWSON CONCURRING IN THE RESULT.

Introduction

1. On April 13, 1982, Community Tele-Communications, Inc. d/b/a Scotts Bluff Cable TV (hereinafter "TCI"), operator of a cable television system serving Scottsbluff, Terrytown, Gering, and unincorporated areas of Scotts Bluff County, Nebraska, filed a "Petition for Special Relief" seeking a waiver of Section 76.92 of the Commission's Rules. Absent the requested waiver, TCI would have to honor the request made of it by Duhamel Broadcasting Enterprises (hereinafter "KDUH-TV"), licensee of Station KDUH-TV (NBC/ABC, Channel 4), Scottsbluff, Nebraska, to delete the duplicating network programming of Station KOA-TV (NBC, Channel 4), Denver, Colorado, carried on TCI's system. TCI's petition is opposed

by KDUH-TV, and TCI has replied. In addition, on May 12, 1982, KDUH-TV filed a "Petition for Initiation of Forfeiture Proceeding" directed against TCI's alleged failure to provide KDUH-TV with nonduplication protection. This petition is opposed by TCI.

Summary of Pleadings

TCI Waiver Petition (CSR-2116)

2. In support of its petition, TCI notes that it has carried KOA-TV's programming since 1960 in Gering and Terrytown, and since 1964 in Scottsbluff and surrounding unincorporated county areas. TCI contends that its system offers diverse programming to its subscribers,[1] and that honoring KDUH-TV's request would require TCI to delete over 55 hours of KOA-TV's programming, "including virtually all prime time programming Sunday through Friday." TCI argues that KOA-TV is a popular station, and that TCI's evaluation of its subscribers' preferences and market needs leads it to conclude that its current signal complement better serves the communities' needs than would the deletions mandated by Section 76.92 of the Rules. TCI asserts that it should be allowed to exercise reasonable business and editorial judgment in this matter,[2] and contends that the burden is on KDUH-TV to demonstrate a need for nonduplication protection.[3] In addition, TCI maintains that the 1972 cable television rules are invalid, as not justified by the record, and hence TCI cannot be compelled to delete KOA-TV's duplicating programming. Moreover, argues TCI, deletion of KOA-TV's programming would cause discontent to its subscribers, citing *Spartan Radiocasting Company v. FCC*, 619 F.2d 314, 318 (4th Cir. 1980), and carriage in full of KOA-TV will promote both diversity and marketplace competition. TCI describes KDUH-TV as a non-priority signal, and argues that its nonduplication request stems merely from its change of city of license from Hay Springs to Scottsbluff without relocating its transmitter, "[which] is as distant from Scotts Bluff today as it

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[1] TCI states that it carries, in addition to KDUH-TV and KOA-TV, Stations KWGN-TV (Ind., Channel 2), KRMA-TV (ETV, Channel 6), KMGH-TV (CBS, Channel 7), and KBTV (ABC, Channel 9), all Denver, Colorado; WTBS (Ind., Channel 17), Atlanta, Georgia; KSTF (CBS/ABC, Channel 10), Scottsbluff, Nebraska; and KTNE-TV (ETV, Channel 13), Alliance, Nebraska, as well as Home Box Office (HBO), the Christian Broadcasting Network (CBN), and the USA Network.

[2] TCI cites both the *Report and Order in Docket Nos. 20988 and 21284*, FCC 80-443, 79 FCC 2d 663 (1980), *aff'd sub nom. Malrite T.V. of New York, Inc. v. FCC*, 652 F.2d 1140 (2d Cir. 1981), *cert. denied sub nom. National Association of Broadcasters v. FCC*, 102 S. Ct. 1002 (1982), and the *Report and Order in BC Docket No. 79-219*, FCC 81-17, 84 FCC 2d 968 (1981), *recon. denied in pertinent part*, FCC 81-366, 87 FCC 2d 797 (1981).

[3] TCI cites *inter alia, United States v. Southwestern Cable Co.*, 392 U.S. 157, 174-75 (1968); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 41-42 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 829 (1977); and *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440, 443 (D.C. Cir. 1958).

was when it identified itself with Hay Springs." TCI contends that KDUH-TV remains a satellite of Station KOTA-TV (NBC, Channel 3), Rapid City, South Dakota, and that because KDUH-TV picks up its network signals from KOTA-TV, the signal quality of KDUH-TV is degraded. TCI claims that Section 76.92 of the Rules is in conflict with the first amendment, citing an amalgam of cases,[4] and argues that the 1972 cable television rules no longer serve the public interest, citing *Docket Nos. 20988 and 21284, supra,* and *Geller v. FCC,* 610 F.2d 973 (D.C. Cir. 1979).

3. KDUH-TV opposed TCI's petition on May 12, 1982. KDUH-TV notes that it began operation early in 1958, and that its transmitter site is located 13.1 miles southwest of Hemingford, Nebraska. When it went on the air, KDUH-TV was licensed to serve Hay Springs, which is located to the northeast of the transmitter site. However, the 1970 population of Hay Springs was 600, and was diminishing. Therefore, states KDUH-TV, it began in 1973 to seek to reallocate Channel 4 to permit KDUH-TV to change its city of license to Scottsbluff, which is southwest of the transmitter site. KDUH-TV notes that Scottsbluff is within the station's city grade contour, and has a population much larger than that of Hay Springs.[5] Following the reallocation of Channel 4 to Hay Springs—Scottsbluff on a hyphenated basis, *Report and Order in Docket No. 20065,* 42 Fed. Reg. 41123, *review denied,* 67 FCC 2d 1610 (1978), KDUH-TV's city of license was ultimately changed to Scottsbluff, effective February 2, 1982.[6] KDUH-TV thereupon moved its main studios to Scottsbluff, and was also entitled to receive nonduplication protection on TCI's Scottsbluff system.[7] KDUH-TV argues that from January through March 1982, the station's programming/operations manager conversed with TCI's manager concerning the provision of nonduplication protection, and was assured that the necessary equipment had been requested and that such protection would be forthcoming.

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[4] *Consolidated Edison Co. of N.Y., Inc. v. Public Service Commission of New York,* 447 U.S. 530 (1980); *FCC v. Midwest Video Corp.,* 440 U.S. 689 (1979); *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 756–57 (1976); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Columbia Broadcasting System, Inc. v. Democratic National Committee,* 412 U.S. 94 (1973); *United States v. O'Brien,* 391 U.S. 367, 377 (1968); *Freedman v. Maryland,* 380 U.S. 51, 57 (1965); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70 (1963); *Home Box Office, Inc. v. FCC, supra.*

[5] The 1980 population of Scottsbluff was 14,156.

[6] FCC File No. BPCT-810202KJ, granted May 27, 1981.

[7] In fact, notes KDUH-TV, it was entitled to receive such protection on TCI's system under Commission rules in effect until May 23, 1975, based on the station's signal contour. KDUH-TV requested nonduplication protection from TCI, which honored the request. However, in the *First Report and Order in Docket No. 19995,* FCC 75-413, 52 FCC 2d 519 (1975), the Commission modified its rules to make nonduplication protection dependent upon fixed mileage zones. Scottsbluff is not encompassed by the Hay Springs specified zone, and TCI ceased providing nonduplication protection to KDUH-TV in early 1975.

KDUH-TV formally requested nonduplication protection in a letter dated February 5, 1982.[8] KDUH-TV denies that its request will impact adversely on TCI's subscribers, because only simultaneously duplicating programming from KOA-TV need be deleted, and can be replaced by KDUH-TV's programming. KOA-TV's syndicated programming and local Denver news, states KDUH-TV, will still be available to TCI's subscribers. KDUH-TV contends that TCI's arguments concerning the station's transmitter location are gratuitous, because KDUH-TV delivers a city grade signal to Scottsbluff, and has done so since locating its transmitter at its present site in October 1970. KDUH-TV states that it does not receive its network programming from Rapid City, as TCI alleges, but "receives a direct network signal at Scottsbluff by microwave from Denver." In fact, notes KDUH-TV, the signal is of such quality that it is sent by microwave an additional two hundred miles to Rapid City's KOTA-TV, which is carried by TCI's Rapid City cable system, which itself affords nonduplication protection to KOTA-TV against KOA-TV. KDUH-TV voices concern, however, over TCI's signal processing equipment, arguing that ". . . TCI uses an old tube-type demodulator to retransmit KDUH-TV, while using state-of-the-art solid-state demodulators for the retransmission of KOA-TV and other signals, including the other Scottsbluff commercial television station . . . ." KDUH-TV contends that it was informed by TCI that TCI intended to upgrade the receiving equipment for KDUH-TV upon institution of nonduplication protection, and that grant of TCI's petition could postpone such an upgrade indefinitely.

4. KDUH-TV takes issue with TCI's assertion that KDUH-TV is a non-priority signal, because KDUH-TV is a local station providing local programming, unlike KOA-TV. KDUH-TV states that "[it] carries some 8.5 hours per week of local news, agricultural information, and public affairs programming, with Scottsbluff programs at noon, 5:30 p.m. and 10:00 p.m." In addition, KDUH-TV notes that it employs approximately fifteen full-time and part-time personnel in Scottsbluff, while KOA-TV has none. Turning to TCI's remaining arguments, KDUH-TV asserts that the attack on the Commission's 1972 rules and regulations is simply a decade too late, and in any event, the specific nonduplication rule challenged by TCI, Section 76.92 of the Rules, was adopted not in 1972 but in 1975, citing *Docket No. 19995, supra*. If TCI feels that the rules themselves are not serving their intended purpose, asserts KDUH-TV, then it is free to file a petition for rulemaking. Nevertheless, argues KDUH-TV, as the rules exist today, it is entitled to the nonduplication protection which it has requested, and TCI must justify its waiver request based upon specific facts and circumstances, citing *560 Broadcast Corp. v.*

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[8] TCI argues that it did not receive this letter until March 29, 1982. *See* paragraph 7, *infra*.

FCC, 418 F.2d 1166 (D.C. Cir. 1969), and *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). In addition, KDUH-TV contends that while it has continuously requested protection and has provided the necessary schedules for years giving TCI both actual and constructive notice of such requests in early February 1982, TCI cannot now refuse to provide such protection pending the outcome of the instant proceeding. Furthermore, KDUH-TV argues that TCI is seeking to protect Mountain Microwave Corp. (hereinafter "MMC"), an affiliated entity of TCI, from competition. MMC's terrestrial microwave system, notes KDUH-TV, supplies TCI's Scottsbluff system with the signals of Denver's five television broadcast licensees, including KOA-TV. Accordingly, speculates KDUH-TV, TCI seeks to keep MMC operational so that TCI may recapture its investment in MMC, and therefore TCI seeks to protect the distant duplicating signal of KOA-TV in the name of diversity, rather than carrying full time in its place a superstation such as WTBS; Station WGN-TV (Ind., Channel 9), Chicago, Illinois; or Station WOR-TV (Ind., Channel 9), Secaucus, New Jersey. Finally, KDUH-TV notes that TCI sought to air the instant controversy at a meeting of the Scottsbluff City Council, but the Council voted unanimously to support KDUH-TV.[9]

5. TCI, in its reply filed June 1, 1982, states that it seeks "continuance of the *status quo ante* . . . ." TCI reiterates its argument that Section 76.92 of the Rules deprives Scottsbluff viewers of Denver advertising on KOA-TV, in violation of the first amendment, and asserts that the Commission has recently recognized this in *Virginia Broadcasting Corporation* (Charlottesville, Virginia), FCC 82–192, 89 FCC 2d 1152 (1982), and in *Holston Valley Broadcasting Corporation (WKPT-TV)* (Kingsport, Tennessee), Mimeo No. 3798, 51 RR 2d 689 (1982). In addition, citing *Community Communications Co., Inc. v. City of Boulder*, 102 S. Ct. 3835 (1982), TCI claims that KDUH-TV and the Scottsbluff City Council may be in violation of federal antitrust laws in attempting to preclude KOA-TV's competition. TCI argues that KDUH-TV seeks to have TCI drop KOA-TV's carriage entirely, and suggests that KDUH-TV may wish to have other competing signals dropped. TCI denies that it is motivated by a desire to further MMC's competitive prospects. TCI claims it desires to serve its subscribers and communities, noting that TCI already carries satellite services and plans to introduce others. TCI argues that "[KDUH-TV's] manager has confirmed that [KDUH-TV's] signal quality is inferior," citing an affidavit from TCI's regional manager, as well as the letter from the Scottsbluff City Council. TCI maintains that this inferiority is not due to TCI's equipment, which is being upgraded in any event for transmission of KDUH-TV. Citing

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[9] A letter to this effect was submitted on April 30, 1982, by Frank U. Koehler, City Manager of Scottsbluff. This letter was served only on KDUH-TV and TCI. KDUH-TV has, however, submitted a copy of this letter.

Midwest Video Corporation, Mimeo No. 4173, __ RR 2d __ (1982), TCI argues that it need not afford nonduplication protection to KDUH-TV's inferior signal. In addition, TCI suggests that uninterrupted carriage of KOA-TV could increase KDUH-TV's revenues, citing *Tri-County Broadcasting Corp.* (Clemson, South Carolina), FCC 69–788, 18 FCC 2d 751, 752 n. 1 (1969), and *Frank Alvin Delle, Jr. and Donald G. Fisher d/b as Voice of Middlebury* (Middlebury, Vermont), FCC 66–361, 3 FCC 2d 512 (1966). TCI estimates that grant of its requested waiver would have an impact on KDUH-TV of 0.19 percent of the station's revenues, based upon formulas found in *Warner Cable Corporation* (Chelsea, Massachusetts), FCC 79–163, 71 FCC 2d 271 (1979), and *Citizens Committee for Expansion of Commercial Television to the State of Delaware*, FCC 78–890, 70 FCC 2d 639 (1978), *aff'd*, FCC 79–74, 71 FCC 2d 38 (1979), which TCI contends is *de minimis*. TCI claims that KDUH-TV has not met its burden under *Carroll-Broadcasting Co. v. FCC, supra*, and contends that the Commission must grant TCI's request pursuant to *Arlington Telecommunications Corporation d/b/a ARTEC* (Arlington County, Virginia), FCC 79–73, 70 FCC 2d 2291, 2298 (1979), *stay denied*, FCC 79–487, 73 FCC 2d 766 (1979), *appeal dismissed sub nom. The Committee to Balance the Impact Gaff and to Make ARTEC Constitutional v. FCC*, No. 79–1303 (D.C. Cir. Feb. 5, 1982). TCI again argues that the 1972 cable rules no longer serve the public interest, especially in view of the Commission's pursuit of deregulation of various telecommunications industries. To protect KDUH-TV against KOA-TV but not against other television stations and communications services, according to TCI, will deny it equal protection of the law, citing *Davis v. Passman*, 442 U.S. 228, 234 (1979); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); and *Reed v. Reed*, 404 U.S. 71, 75 (1971). TCI argues that its petition was timely filed, and that *Geller v. FCC, supra*, mandates consideration of its arguments concerning the validity of the cable television rules.

KDUH-TV Forfeiture Petition (CF-34)

6. In support of its request for forfeiture, KDUH-TV reiterates the arguments it made previously in its opposition to TCI's waiver petition. KDUH-TV contends that it "has continuously requested non-duplication protection, and provided required protection schedules, for a number of years," committing its most recent request to writing and mailing it to TCI on February 5, 1982. Because TCI did not file its waiver petition until April 13, 1982, argues KDUH-TV, TCI cannot claim the automatic stay provisions of Section 76.92(a) of the Rules.[10] Accordingly, KDUH-TV urges that the Commission

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[10] Section 76.97(a) of the Rules stays the requirement to provide nonduplication protection pending resolution of petitions for waiver of this requirement if such a petition is filed within fifteen days of receipt of the request for protection.

issue a Notice of Apparent Liability against TCI in the maximum amount of $20,000, and issue successive Notices of Apparent Liability each ten days in the amount of $20,000[11] until TCI ceases to violate Sections 76.92 and 76.94 of the Rules.

7. TCI opposed KDUH-TV's forfeiture petition on June 1, 1982. TCI argues that it received no formal request for nonduplication protection from KDUH-TV until March 29, 1982, when it received KDUH-TV's letter dated February 5, 1982. Accordingly, states TCI, its petition was timely filed on April 13, 1982, to invoke the stay provision of Section 76.97(a) of the Rules (*see* note 10, *supra*). TCI contends that the rule implicitly requires written notice, citing the *Memorandum Opinion and Order in Docket Nos. 19995 and 18785*, FCC 75–1143, 56 FCC 2d 210, 227 (1975), and that the fifteen-day filing period of Section 76.97(a) of the Rules runs from the receipt of formal notice, citing *Quincy Cable TV, Inc.* (Quincy, Washington), Mimeo No. 002764, 50 RR 2d 62, 65 (1981), *review denied*, FCC 82–193, 89 FCC 2d 1128 (1982), *recon. denied*, FCC 83–60, 93 FCC 2d 412 (1983), *appeal docketed*, No. 83–1283 (D.C. Cir. Mar. 16, 1983), and *Cable TV of Marin, Inc., et al.*, Mimeo No. 002501, 50 RR 2d 1 (1981). TCI asserts that the issues it raises in its petition (CSR-2116) are valid, and novelty is no reason to reject petitions, citing *ARTEC*, *supra*. TCI argues that grant of its requested waiver would impact KDUH-TV's revenues by 0.19 percent (*see* paragraph 5, *supra*), which TCI contends is by any standard *de minimis*.[12] TCI adds that this impact is not adverse in view of KDUH-TV's $225 network compensation rate (together with KOTA-TV); KDUH-TV's 30-second rate of $500; and the lack of a showing of financial need by KDUH-TV.

Discussion

8. A waiver of the Commission's network nonduplication rules may ordinarily only be granted upon the submission of specific evidence demonstrating adverse economic impact on the affected cable system as a consequence of compliance or, conversely, demonstrating by a similarly specific factual showing that a waiver will not adversely impact the broadcaster seeking protection. *See Texas*

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[11] Section 503(b)(2) of the Communications Act of 1934, as amended, and Section 1.80(b) of the Rules limit forfeitures to a maximum of $2,000 per violation, each day of a continuing violation constituting a separate offense.

[12] TCI cites, *inter alia*, *Big Valley Cablevision, Inc., et al.*, FCC 81–50, 85 FCC 2d 180 (1981), *stay and recon. denied*, FCC 81–153, 85 FCC 2d 973 (1981), *appeal dismissed sub nom. Great Western Broadcasting Co. v. FCC*, No. 81–7152 (D.C. Cir. Feb. 8, 1982); *Warner Cable Corp.* (Sidney, Ohio), FCC 81–34, 48 RR 2d 1429 (1981); *Telecable Associates, Inc.* (Lafayette, Louisiana), FCC 81–6, 84 FCC 2d 794 (1981); and *Colorado Springs Cablevision, Inc.* (Colorado Springs, Colorado), FCC 80–409, 47 RR 2d 1563 (1980).

Community Antennas, Inc. d/b/a Nacogdoches Cable TV (Nacogdoches, Texas), FCC 78–525, 68 FCC 2d 1271, 1279–80 (1978).[13] In the instant case, TCI has submitted an impact analysis of the effect of grant of a waiver to TCI alone. (*See* paragraph 5, *supra*). This analysis ignores however, cable systems in the market which serve Alliance and Kimball, Nebraska, and Torrington, Wyoming. Nevertheless, we turn to a market-wide analysis performed by the Commission's staff which indicates that grant of the requested waiver would have an impact on KDUH-TV's audience of only 3.24%. and on the television station's revenues of only 2.1%.[14] We

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[13] The formula used herein for analysis of estimated impact is based on that found in *Texas Community Antennas, Inc.*, 68 FCC 2d at 1282–83. It is specifically designed to measure impact from lack of nonduplication protection, and hence differs from formulas such as that found in the *Notice of Inquiry in Docket No. 21284*, FCC 77–407, 65 FCC 2d 9, 14 (1977), which are designed to measure impact from the importation of a distant television signal. A station believing that the use of the formula does not accurately reflect its position would be expected to submit in its pleadings a specific showing (1) as to the station's financial condition, and (2) that the anticipated losses of revenue would adversely affect the public interest in light of the station's condition. *See, e.g., KDUB-TV, Inc.* (Dubuque, Iowa), FCC 81–530, 88 FCC 2d 450 (1981), *recon. denied*, FCC 82–182, 89 FCC 2d 994 (1982).

[14] The staff analysis includes the cable systems serving Scottsbluff, Alliance, and Kimball, Nebraska, and Torrington, Wyoming, and utilizes the following formula:

$$\frac{A \times B \times C \times D \times E}{F} = \text{Audience Diversion}$$

where,

A = The number of affected cable subscribers. (Source: *1982 Cable & Stations Coverage Atlas* and *Television Factbook*, Services Volume, 1981–82 Edition, No. 50);

B = The percentage of ADI households using television (HUTS or market rating), on average, during the 9 AM to Midnight time period. For the Cheyenne ADI, this figure is 37%. (Source: Arbitron, *Daypart Audience Estimates Summary*, February 1982);

C = KDUH-TV's average all day share of viewing in cable households in the county where each system is located. (Source: Arbitron, *County Coverage Surveys, 1982, CATV-Controlled*, when available);

D = This factor is an estimate of the percentage if KDUH-TV's broadcast week which would be affected by the loss of nonduplication protection. Exhibit A in the petition shows sample requests for nonduplication protection. At most, KDUH-TV is requesting 55 hours of protection out of a broadcast week of approximately 141 hours, which represents 39% of KDUH-TV's broadcast week;

E = A fractionalization factor of 50%, which assumes the equal likelihood of a viewer choosing the distant signal over the local station when both are showing the same program; and

F = An estimate of KDUH-TV's average 9 AM to Midnight audience. Using the must conclude, based on an analysis of the evidence concerning impact to KDUH-TV, that grant of the waiver requested by TCI will not impair KDUH-TV's ability to operate in the public interest.

9. We recognize that the Commission has in the past denied requests for waivers of our rules in cases in which petitioners have failed to submit a market-wide impact study. However, given the fact that this petition has been pending for over a year with an associated request to institute appropriate enforcement procedures, we have found that the interests of administrative dispatch would best be served by utilizing the minimal data supplied and completing the impact study ourselves. *Compare Cablecom-General, Inc.*, FCC 79–200, 71 FCC 2d 343 (1979). Because the impact projection was based largely on our staff's analysis, we find it appropriate to afford interested parties twenty (20) days to file further opposition, and TCI shall have fifteen (15) days thereafter to reply. *See Big Valley Cablevision, Inc.* (Stockton, California), FCC 80–18, 75 FCC 2d 702, 713 (1980), *aff'd* FCC 81–50, *supra*.

10. Concern for administrative dispatch prompts us to make some procedural refinements in the handling of similar requests for special relief in the future. We shall conduct these proceedings based on the procedures stated at Sections 76.7(d) and (e) of the Rules rather than by the two-step procedure followed in this case and in *ARTEC* waiver cases. *Arlington Telecommunications Corp., d/b/a ARTEC*, 69 FCC 2d 1923 (1979). For a further explanation, see *Manhattan Cable TV Service, Inc.* (Manhattan, Kansas), FCC 83–436 (adopted today). We also stress that henceforward, if a petitioner seeks to rely on an impact analysis and does not submit an analysis performed on a market-wide basis or which is fundamentally deficient in any other respect, the petitioner's pleading will be dismissed.

February 1982 Arbitron *Daypart Audience Estimates Summary*, this figure is determined by subtracting the audience listed for KOTA-TV and its two 100%-satellites from the audience for KOTA-TV and all three of its satellites under the Rapid City market listing.

This value is 5,000 TV households.

The expected audience diversion is then calculated by system as follows:

Scottsbluff

$$\frac{7{,}059 \times .37 \times .10 \times .39 \times .50}{5{,}000} = .0102$$

Alliance

$$\frac{2{,}965 \times .37 \times .37 \times .39 \times .50}{5{,}000} = .0158$$

11. In addition, we note that most of the constitutional arguments raised by TCI have been heard and rejected in other proceedings. *See, e.g., Great Falls Community TV Cable Co. v. FCC*, 416 F.2d 238 (9th Cir. 1969); *Memorandum Opinion and Order in RM-2488*, FCC 81–354, 87 FCC 2d 850 (1981). To the extent that TCI's equal protection argument has not been previously addressed, it is sufficient to note that TCI, as a cable television system operator is not similarly situated vis-a-vis different telecommunications entities, and that special regulatory considerations may be warranted for differing entities. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977); *Railway Express Agency v. New York*, 336 U.S. 106 (1949). In addition, assertions of technical deficiencies, unsupported by engineering data, do not demonstrate signal inferiority. *E.g., Cable TV of Durango, Inc.* (Durango, Colorado), FCC 77–462, 65 FCC 2d 415, 419 (1977). With regard to KDUH-TV's allegations concerning MMC, we note that TCI is entitled to carry whatever signals it desires (subject, of course, to its mandatory carriage obligations). The remaining cases cited by TCI are not germane to this proceeding. *Virginia Broadcasting Corporation, supra*, and *Holston Valley Broadcasting Corporation, supra*, both addressed the question of the nonduplication rights of significantly viewed distant signals, not locally licensed signals. Finally, nothing in *Community Communications Co., Inc. v. City of Boulder, supra*, questions the validity of the Commission's nonduplication rules.

12. Turning to the question of whether or not to impose a forfeiture on TCI, as requested by KDUH-TV, we initially note that Section 76.94(a) of the Rules, which sets forth the notification requirements which are a prerequisite to the receipt of nonduplication protection, requires that notification be "submitted" or "given," and that it be "received," but the rule does not specify that such notification be given in writing. Notification complying in all respects with the requirements of Section 76.94 of the Rules is not deficient merely because it is given orally. Nevertheless, in instances of oral notification which are subsequently made the basis for a

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Kimball

$$\frac{1{,}279 \times .37 \times .19 \times .39 \times .50}{5{,}000} = .0036$$

Torrington

$$\frac{2{,}194 \times .37 \times .09 \times .39 \times .50}{500} = .0029$$

$$\text{Total} = .0324$$

Thus, the total estimated potential impact of granting TCI's requested waiver would be a 3.24% audience loss to KDUH-TV. If the assumed 65% revenue loss cited by TCI in its analysis is applied to this figure, then the maximum impact on KDUH-TV might be a 2.1% revenue loss. Even using a more traditional 75% figure, *see, e.g., Garryowen Corporation* (Great Falls, Montana), FCC 79–138, 70 FCC 2d 2336, 2341 (1979), a maximum revenue loss of 2.4% is predicted.

complaint, we must note that, absent documentation or other evidence of such conversations, the reliability of such notification may be open to question. *See Telecable Associates, Inc.* (Lafayette, Louisiana), Mimeo No. 08273, 44 RR 2d 335, 339 (1981). In particular, in the instant case, although the written notification sent by KDUH-TV to TCI is dated February 5, 1982, we note that the concurrently mailed program schedule is dated as having been prepared March 22, 1982. This is the only evidence in this proceeding of a program schedule having been submitted to TCI by KDUH-TV subsequent to February 5, 1982. TCI's statement that it did not receive written notification from KDUH-TV until March 29, 1982, therefore, which is unchallenged by KDUH-TV, will be accepted. TCI's petition (CSR-2116) was timely filed on April 13, 1982, to relieve TCI temporarily from its obligation to provide KDUH-TV nonduplication protection against KOA-TV, pursuant to Section 76.97(a) of the Rules. Therefore, no forfeiture will be imposed against TCI.

13. In view of the foregoing, we find that grant of TCI's petition to the extent indicated above, but not of KDUH-TV's petition, is in the public interest.

14. Accordingly, IT IS ORDERED, That if further opposition is received within twenty (20) days from the release date of this opinion, final action on the merits of the "Petition for Special Relief" filed April 13, 1982, by Community Tele-Communications, Inc. d/b/a Scotts Bluff Cable TV IS DEFERRED.

15. IT IS FURTHER ORDERED, That if no further opposition is received within twenty (20) days from the release date of this opinion, the "Petition for Special Relief," filed April 13, 1982, by Community Tele-Communications, Inc. d/b/a Scotts Bluff Cable TV IS GRANTED.

16. IT IS FURTHER ORDERED, That the "Petition for Initiation of Forfeiture Proceeding" filed May 12, 1982, by Duhamel Broadcasting Enterprises IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Application, Processing of
International Agreements and Treaties
Proposal, Change In
Satellite, Direct Broadcast

Certain procedures established for further processing of proposals in Direct Broadcast Satellite (DBS) service, following the conclusion of the 1983 Region 2 Administrative Radio Conference (RARC-83). Permittees are to file modification applications to conform their original proposals to the RARC-83 Final Acts and submit information necessary for notification of assignment implementation to the International Frequency Registration Board.

–Direct B/C Satellite Service

FCC 83–451

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Processing Procedures Regarding the Direct Broadcast Satellite Service	
In the Matter of Applications of	File Nos.
SATELLITE TELEVISION CORPORATION CBS, INC.	DBS-81–01 DBS-81–02
DIRECT BROADCAST SATELLITE CORPORATION	DBS-81–03
GRAPHIC SCANNING CORPORATION	DBS-81–05
RCA AMERICAN COMMUNICATIONS, INC.	DBS-81–06
UNITED STATES SATELLITE BROADCASTING COMPANY, INC.	DBS-81–07 DBS-81–08
VIDEO SATELLITE SYSTEMS, INC.	DBS-81–09
WESTERN UNION TELEGRAPH COMPANY	
For Authority to Establish Interim Direct Broadcast Satellite Systems.	

MEMORANDUM OPINION AND ORDER

(Adopted: October 6, 1983 Released: October 7, 1983)

BY THE COMMISSION:

1. This *Order* informs all parties interested in the Direct Broadcast Satellite (DBS) service of the Commission's procedures for further processing of proposals for the establishment of DBS

systems. This item is designed specifically to instruct DBS permittees on the information which is required to be filed in applications for modification of construction permits so as to conform to the changed circumstances since their original filing.[1] Those parties that have unprocessed applications already on file and those that expect to file applications in the near future should note the information contained herein as it will form the basis for future Commission action on those applications.[2] This action is prompted by the recent conclusion of the Region 2 Administrative Radio Conference which adopted an international agreement allowing countries in the Western Hemiphere to implement DBS service, and is designed to facilitate the early domestic implementation of the service.

2. The Final Acts of the 1983 Region 2 Administrative Radio Conference are available for public inspection at the Federal Communications Commission in the Public Reference Room on the second floor of the Commission's headquarters building at 1919 M Street, N.W., Washington, D.C. This document contains the entire text of the Region 2 agreement, and has been incorporated into the public files for the domestic DBS rule making (General Docket 80–603) and the Commission's RARC-83 preparations (General Docket 80–398). Individuals seeking copy service can purchase the text through the Commission's private contractor, International Transcription Services (202–296–7322).

3. The Final Acts embody the text of the agreement signed by participating countries in the Western Hemisphere in the recently concluded Conference on the Direct Broadcast Satellite service (internationally known as Broadcasting-Satellite Service (BSS)). The text includes all details of the results of the Conference including the international technical parameters of DBS systems, the orbital locations and channel utilization requirements, and the international procedures required for Plan modification and DBS system implementation by individual administrations.[3] All parties interested in the implementation of DBS systems are urged to become familiar with these details as soon as possible in order to facilitate expedited U.S. international coordination of system implementation. The Final Acts will be of special interest to all parties that have applied or expect to apply for authorization to implement U.S. DBS systems.

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[1] The Commission has granted conditional construction permits to eight applicants in the DBS service: CBS, Inc.; Direct Broadcast Satellite Corporation; Graphic Scanning Corporation; RCA American Communications, Inc.; Satellite Television Corporation; United States Satellite Broadcasting Company, Inc.; Video Satellite Systems, Inc.; and Western Union Telegraph Company. *See, Satellite Television Corp.*, 91 FCC 2d 953 (1982) and *CBS, Inc., et al.*, 92 FCC 2d 64 (1982).

[2] Three companies now have applications on file: National Christian Network, Inc.; Satellite Development Trust; and Satellite Syndicated Systems, Inc.

[3] A summary of the important details of the Final Acts is included in the Commission's News Release of July 28, 1983 (Mimeo No. 5606).

4. The Federal Communications Commission intends to move forward on these matters as promptly as possible in order to expedite the initiation of DBS service to the public. Thus, the proposals of DBS permittees and other applicants should be modified in the manner and time period set forth below so that the Commission can process applications, commence International Frequency Registration Board (IFRB) notification, and make operational grants without undue adminstrative delay.[4]

5. DBS permittees and others with applications before the Commission or planning to submit applications will be expected to conform their applications to the Final Acts of the RARC-83 conference or to demonstrate how their proposals can be made consistent with the technical and procedural parameters of the Region 2 agreement. Current permittees will note that the Final Acts contain certain variants from the technical and service parameters that were under consideration both at the time their applications were first submitted to the Commission and later when the Commission granted the conditioned construction permit to applicants in the "first cut-off" list. *See Satellite Television Corp.* and *CBS, Inc., et al., supra*. Nonetheless, the Commission will construe the applications for modification of construction permits, insofar as they include modifications of technical parameters, service areas, etc., as minor modifications. However, permittees should recognize that any request for modification involving additional use of the orbit-spectrum resource may constitute a significant change warranting the filing of a separate application for a major change in facilities.[5]

6. The applications for modification of construction permits and amendments to other pending applications should be in narrative form following the format of the original application, including any changes in information on file with respect to the applicant's legal and financial qualifications and programming proposals. Also, applicants should provide all relevant information on the reason for all technical changes that are not clearly related to the results of the

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[4] All parties should note that the Final Acts include the assignment to the U.S. of 32 channels at each of eight orbital positions. This number of channels eliminates any need for the Commission to consider comparative issues or apply other selection procedures in the further processing of the first round of DBS applications. *See also*, Section 100.13(b) of the Commission's Rules.

[5] The Commission soon will complete preliminary processing of those second-round applications currently pending with the Commission and announce the "cut-off" date, which will be for a period of time equivalent to that afforded existing permittees to modify their proposals, for submission of amendments to those applications and the filing of other applications to be processed concurrently. Parties that intend to file such amendments and applications, including current permittees that file major modification proposals, should be prepared to take into account fully the technical and service parameters included in the RARC-83 Final Acts. A Public Notice announcing these details will be forthcoming.

RARC-83 Final Acts. Although permittees should specify their preference for specific channels and orbit locations as appropriate, it should be noted that Section 100.13(b) of the Commission Rules specifies that orbital locations and channels are considered interchangable and equivalent. Although the Commission will attempt to accommodate the reasonable preferences of applicants, no preference normally will be formally granted before other requirements as specified in the following paragraph are met. However, in order to facilitate domestic planning at this time, the modification proposals and amendments submitted should reflect any present or anticipated unique technical requirements that need to be taken into account in domestic assignment planning. For example, an applicant may need the assignment of channels and associated polarization in a particular configuration in order to implement HDTV or other technologies for enhancing picture quality.

7. Further, DBS permittees are reminded of the due diligence in construction requirement that is a condition of their construction permits. Under the specific terms of the *DBS Report and Order*, 90 FCC 2d 676 (1982), permittees must begin construction or complete contracting for construction of the satellite station within one year of the grant of the construction permit, and the satellite station must be in operation within six years of the grant. *See* Section 100.19(b) of the Commission Rules. However, due to uncertainty created by the pendency of the RARC-83 Conference and the complications inherent in planning for the launch of initial systems, the Commission has determined that all existing permittees who have not complied with this condition will be allowed a period of one year from the date of the signing of the RARC-83 Final Acts, *i.e.*, until July 17, 1984, to do so. This will not preclude and, in fact, we encourage the filing of an earlier showing by individual permittees. In this regard, permittees should note that it may be in their interest to comply with the due diligence requirement at the earliest possible date. While the Commission may grant modified construction permits as they relate to certain technical parameters and service areas prior to compliance with the due diligence condition, the Commission will neither reserve nor grant specific orbital locations and frequency assignments until the condition has been met. The granting of authorizations for particular orbital positions and channels will be on a first-come, first-served basis after the required due diligence showing has been made. As noted, the Commission also intends to act expeditiously on second-round DBS applications. Permits issued to second-round applicants will be conditioned on compliance with the due diligence requirement within one year and orbital locations and channels also will not be assigned until the requisite showing has been made. However, a second-round permittee will not be assigned a specific orbital position or channel prior to July 17, 1984, unless all first-round permittees have demonstrated due diligence before that date.

8. Thus, the accommodation of an applicant's specific assignment preferences will depend upon the availability of the requested orbital position and frequency assignment at the time the applicant complies with the due diligence requirement. If its preferences cannot be accommodated at such time, alternative orbital positions and channels will be assigned as appropriate. Furthermore, we presently believe that only a showing of the most extraordinary circumstances would warrant consideration of any request by a first-round permittee for an extension of the due diligence requirement beyond July 17, 1984. One important factor to consider at such time would be whether or not sufficient channels are available to meet the needs of second-round applicants. If more applications are filed than are presently anticipated and adequate spectrum is not available to accommodate their needs, we may be required to hold comparative hearings or establish other methods for selecting among mutually exclusive applicants. If this becomes necessary, it is unlikely that any first-round permittee would be granted an extension. To do so under such circumstances may unfairly delay consideration and resolution of the second-round proposals. Finally, regardless of the circumstances that may develop, any extension request would also have to be assessed in terms of the prejudicial effect a grant might have on other permittees and applicants.

9. Permittees and applicants should recognize that the Plan adopted by the RARC-83 specifies many details for the utilization of "assignments" specified for use by the United States and by other administrations throughout Region 2. Given this context, the Commission intends to use the international plan for the primary basis for domestic utilization of the DBS service. The Commission recognizes that the technical parameters used for planning at RARC-83 provide significant technical flexibility to permittees seeking to implement systems which vary from, but are not inconsistent with, these parameters, and expects that U.S. licensees will wish to take full advantage of this flexibility.[6] Permittees and licensees of DBS systems are not protected from any interference which may be caused by the grant of an application for a new permit or license, or for modification of an existing system, which is in accordance with the RARC-83 Final Acts and Commission rules and policies. Applicants are urged to submit technical and service proposals consistent with the specifications of the Final Acts, whenever possible, so as to avoid unnecessary international coordination.

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[6] Parties should note that the U.S. has taken two very significant "reservations" to the technical parameters embodied in the Final Acts and that these are included in the Final Acts. These relate to power flux-density and polarization requirements. Also parties should scrutinize carefully the notification procedures given in Article 5 of Parts I and II, which include a reference to resolution COM 6/5. Resolution COM 6/5 addresses "interim systems" which are intended to be operated for a specified period.

10. In this connection, applicants are expected to include in an addendum to their applications all the technical information necessary for notification of implementation of the planned assignment to the IFRB. The required information for notification is contained in Part I of Annex 2 of the Final Acts. Applicants seeking domestic authority to implement DBS systems that are not in conformity with the Region 2 Plan should give a full explanation why domestic authorization of such a system is in the public interest to assist the Commission in making such a finding. In addition, these applicants should give the Commission very detailed technical data on the effects of the proposed deviation on the assignments specified for use by the U.S. and other Region 2 administrations. Permittees and applicants should be very careful to recognize that nonconforming proposals that would decrease the efficiency of spectrum utilization by the U.S. or would create additional interference to other assignments either designated for use by U.S. or other administrations may come under intense scrutiny as a matter of domestic policy and involve significant international coordination.

11. All permittes should file their applications for minor modification of construction permits according to these instructions no later than 90 days from the release of this document, but may do so earlier. Applications that are otherwise complete, consistent with U.S. international and domestic policy, and include the required showings for processing of requests for assignment of orbital locations and channels will be processed as soon as possible and in the order received.

12. Accordingly, IT IS ORDERED, That all DBS permittees listed in the caption to this item shall amend their proposals as specified herein, no later than 90 days from the release of this document.

13. IT IS FURTHER ORDERED, That the one year due diligence in construction requirement of Section 100.19(b) of the Commission's Rules IS WAIVED with respect to these permittees, and that permittees must make this required showing no later than July 17, 1984.

14. IT IS FURTHER ORDERED, That Section 100.15 of the Commission's Rules, providing for a 45-day cut-off period, IS WAIVED to the extent of permitting the Mass Media Bureau to issue a Public Notice for the acceptance for filing of pending applications and the establishment of a second "cut-off" date consistent with the time period afforded existing permittees to modify their proposals.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Comparative Coverage Issue
Comparative Hearing
Diversification of Control of Mass Medial
Ownership and Management, Integration of
Review by Review Board

Review Board affirms Initial Decision. Substantial comparative coverage preference for providing first television service to 2,309 persons, second service to 355 persons, and third and fourth service to some 14,000 persons outweighs slight diversification and substantial integration.
–FBC, Incorporated
BC Docket No. 82–106

FCC 83R–75

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FBC, INCORPORATED Lexington, Kentucky	BC Docket No. 82–106 File No. BPCT-810529KF
WAY OF THE CROSS OUTREACH, INC. Lexington, Kentucky	BC Docket No. 82–108 File No. BPCT-810806KK
For Construction Permit	

Appearances

John L. Tierney for FBC, Incorporated; *Mark W. Amerman* for Way of the Cross Outreach, Inc.; and *Joseph A. Belisle* for the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: September 26, 1983; Released: October 6, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. In this comparative case to select a new UHF television station for Lexington, Kentucky, the written and oral arguments have required us to closely examine the weight to be given to superior coverage to underserved areas and to consider the teaching of such cases as *Ram Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976), and

Golden State Broadcasting Corp., 54 RR 2d 348 (Rev. Bd. 1983). After a trial-type hearing, in an Initial Decision, FCC 83D-8, released February 7, 1983, Administrative Law Judge Chachkin granted the application of Way of the Cross (Way), which was awarded a slight preference on the diversification factor and a substantial preference for participation of owners in management of the station. *I.D.*, para. 49. FBC, Inc. contended in its exceptions that its competing application should have received a decisive preference because FBC will provide superior comparative coverage to persons who receive no television service at all, or little service from one to three other stations. After oral argument on May 13, 1983, we asked the parties to file supplemental briefs indicating whether any noncommercial television stations provide service to the underserved areas, and whether service from noncommercial television stations is a relevant consideration under established Commission policy. In essence, the Board now agrees with FBC's basic argument that "great weight" or a "significant preference" should be awarded to FBC for its superior comparative coverage, which helps achieve the first and other basic objectives of the FCC's television allocation priorities which are designed to implement the provisions of Section 307(b) of the Communications Act. And this comparative preference outweighs Way's other preferences for the reasons set out below, paras. 12–14.

2. *Background*: In the Initial Decision, Way was awarded a slight diversification preference because a 10% FBC principal has a 9.8% interest in a Tampa, Florida television station, which is located some 800 miles away from Lexington, and a 1.6% interest in a Memphis, Tennessee television station, which is located some 400 miles away. *I.D.*, paras. 4, 41. Way, which received 66.7% full-time and 33.3% part-time integration credit, was also awarded a substantial preference for participation of ownership in management over FBC, which was credited for 10% full-time, 10% substantial time, and 10% part-time integration. *I.D.*, para. 48, Summary.

3. By contrast, FBC received a moderate comparative coverage preference because it will serve 2,309 persons who receive no other television service from commercial television stations; 355 persons who receive service from one other television station; 4,556 persons who receive service from two other television stations; 9,592 persons who receive only three other services; and 9,727 persons who receive service from four other stations. *I.D.*, paras. 39, 48. After noting that providing a first and second service is a factor of considerable significance, the ALJ awarded FBC a moderate preference. *I.D.*, para. 48. In weighing these various preferences, he reasoned that integration is a factor of substantial importance because of its direct relationship to the licensee's sensitivity to public needs, but that comparative coverage is less directly related to the policy statement's objectives since it goes to technical efficiency, citing *WLCY, Inc.*, 17 FCC 2d 338, 346 (Rev. Bd. 1969). Thus, Way's slight

diversification and substantial integration preferences easily outweighed FBC's moderate preference for comparative coverage. *I.D.*, para. 49. Finally, the ALJ concluded that FBC's reliance on *Ram Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976), did not require a different result. *I.D.*, para. 49.

DISCUSSION

4. *Participation in Management*: FBC's exceptions filed March 21, 1983, devote much space to a challenge of the ALJ's award of a substantial preference to Way for participation of ownership in management. Br. at 7–26. Way is a nonprofit non-stock company controlled by six trustees. *I.D.*, paras. 18–19. FBC argues that the six trustees who will be involved in station management do not have sufficient financial investment in the company to be awarded integration credit. Next, FBC argues that one of Way's six trustees, Edward Bowlds, dominates the other Way trustees, including his wife and sister, and thus "has created, through his corporate alter ego . . . a sinecure for himself and . . . his family." Br. at 18. Finally, it argues that Mr. Bowlds in the past demonstrated "instability and irresponsibility" and that the ALJ erred in foreclosing its inquiry into his past "vagabond life-style" and his "peripatetic existence." Br. at 19, 20, 26.

5. We reject FBC's strained arguments on this point. Financial investment is only one of a number of factors which are considered in judging a trustee's commitment before awarding integration credit. See, *e.g., Roanoke Christian Broadcasting, Inc.*, 52 RR 2d 1725, 1727 (Rev. Bd. 1983). Here, four of the six trustees are named as guarantors on Way's bank loan; they have already spent a considerable amount of time preparing and prosecuting the application, and four have made arrangements to spend full time, and two part time, managing the station. Also, there is no record support for the "sinecure" argument. Moreover, the attack on Mr. Bowlds' past history, dating from 8 to 25 years ago, pushed to the limit an adversary's right to impeach his opponent's integration case. Contrary to FBC's argument, the ALJ is to be commended for the sensitivity he demonstrated during the hearing which probed some very sensitive subjects, *see, e.g., I.D.*, para. 23, note 5. We agree with his evaluation of the record and affirm his findings and his award of a substantial integration preference to Way. *See I.D.*, paras. 3–37, 42–48. This award is consistent with recent decisions in which substantial preferences were awarded.[1]

6. *Comparative Coverage*: FBC also urged in its brief that it

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[1] *HLD & M Communications*, 53 RR 2d 732, 734 para. 9 (Rev. Bd. 1983) (100% full time vs. 45% full time); *Family Broadcasting Group*, 53 RR 2d 662 (Rev. Bd. 1983) (100% full time vs. 46% full time); *Cleveland Television Corp.*, 91 FCC 2d 1129, 52 RR 2d 581 (Rev. Bd. 1982), *review denied*, FCC 83–235, released May 18, 1983 (50% full time vs. 15% full time); *Fox River Broadcasting, Inc.*, 88 FCC 2d 1132, 50 RR

should have been awarded a substantial preference for its superior coverage proposal, Br. at 26–31, and that this superior coverage to underserved areas outweighed the other comparative factors in this case. Br. at 31–34. The following chart prepared by FBC (Br. at 28) illustrates the comparative coverage differences.

	FBC Proposal		*Way*	
	Area Sq. Mi.	*Pop.*	*Area Sq. Mi.*	*Pop.*
1st TV Service	59.0	2,309	0	0
2nd TV Service	6.2	355	0	0
3rd TV Service	167.0	4,556	4.1	138
4th TV Service	184.2	9,592	8.5	282
Total	416.4	16,812	12.6	420

7. FBC notes that in awarding it only a moderate preference the ALJ relied on *Communications Properties, Inc.*, 92 FCC 2d 45, 52 RR 2d 981 (Rev. Bd. 1982), where the applicant who was awarded a moderate coverage preference provided a *second* nighttime service to 4,456 persons. Here, by contrast, FBC's proposal is entitled to substantially more credit because it furthers the first priority of the Commission's television allocations policy, *Television Assignments (Sixth Report and Order)*, 41 FCC 148, 167 (1952), by providing a first television service (daytime and nighttime) to 2,309 persons. FBC will also satisfy another high priority by providing a second service to 355 persons; and will provide a third and fourth service to some 14,000 persons in underserved areas. According to FBC, the decision in *WLCY, Inc., supra*, on which the ALJ relied, was substantially undercut if not reversed by the later decisions in *Ram Enterprises, supra*, and the following reasoning from *Chapman Radio and Television Company*, 19 FCC 2d 185, 236 n. 38 (ALJ, 1968), *affirmed*, 19 FCC 2d 157 (Rev. Bd. 1969):

> [U]nlike the other criteria for evaluating comparative proposals, engineering coverage is the least likely to be changed. Local owners may move away or sell out to outsiders. Integrated owners may decide to entrust daily management to salaried staff. But significant technical changes cannot be made except on application to, and approval of, the Commission.

8. Finally, FBC argued that the ALJ improperly weighed its coverage preference in the ultimate evaluation. Principal reliance was placed on *Ram* where a comparative coverage preference overcame a serious diversification preference against the winning applicant which owned another station in the community; and that applicant proposed 0% integration. Here, FBC's integration proposal is much sounder, para. 2 above, and FBC receives only a slight diversification demerit because a minority (10%) stockholder held

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2d 1321 (Rev. Bd. 1982), *modified*, 53 RR 2d 44 (1983) (100% full time vs. 50% full time).

two small interests in distant television stations. FBC urged the Board to prefer its application by following the holding in *Ram* that:

> . . .the provision of a first radio service to a substantial number of people is a factor of great weight . . . . In this case, we believe that the significant disparity between the number of persons who would receive first and second services under the applicants' proposals outweighs [the losing applicant's] preferences on diversification and integration. While these factors remain significant, they do not, in our judgment, have quite the importance of bringing service to a substantial number of people who do not now have any. 57 FCC 2d at 853 (footnotes omitted).

9. Way's reply brief defended the ALJ's award of a moderate preference for comparative coverage and his ultimate balance. (Br. 18–21). *Ram* was distinguished because there the applicant provided a first service to more people, 4,938 during the day and 10,314 at night. In *Ram* the integration superiority was only 25%, here it is much more, paras. 2, 5 above. Way also suggested that *Ram* is "*sui generis*" and does not overrule *WLCY*, and that the weight of precedent "establishes that integration is the most important consideration, even when a comparative coverage preference is present, under the best practicable service criterion." (Br. at 19, 20).

10. As previously noted, the parties were asked to submit supplemental briefs indicating whether the presence of noncommercial television service has a bearing on the decision of the comparative coverage issue. Both the applicants and the Mass Media Bureau have filed helpful briefs. Our review of the briefs establishes that in the past noncommercial television stations have not been considered in ascertaining underserved areas. *See, e.g., Minshall Broadcasting Co., Inc.*, 15 FCC 2d 931, 15 RR 2d 394 (Rev. Bd. 1969). FBC points out that the Commission's television allocation rulemaking established that furnishing one television service to all people was the first priority and that generally a noncommercial or education channel was not reserved for a community until it had been assigned three commercial television stations. *Sixth Report and Order, supra*, 41 FCC 2d at 166–67; FBC Supp. Br. at 7–8. Similarly, the Commission's rules on radio station application acceptability exclude consideration of noncommercial AM and FM stations in determining the number of other radio services to underserved areas. 47 CFR 73.37, Note 7.

11. Way's brief stresses that commercial and noncommercial stations are becoming more closely aligned, that noncommercial stations are moving toward the same funding mechanisms as commercial stations, differences in programming are becoming less significant, and that programming broadcast by both types of station is similar. Way Supp. Br. at 5–11. It also pointed to service to be provided by new developing technologies such as low power, cable and subscription television, and direct broadcast satellites. *Id.* at 11–16. These are factors which may be relevant in a rulemaking proceeding to change the established television priorities previously

discussed. Until such change is made by the Commission the Board is not free to ignore or modify established policy. *Horne Industries, Inc.*, 91 FCC 2d 1193, 52 RR 2d 1009 (Rev. Bd. 1982). Accordingly, noncommercial television service is not relevant to our resolution of the comparative coverage issue in this case.

12. FBC has the better side of the argument. *Ram* is not *sui generis*: at the heart of that decision is a traditional recognition by both the Commission and the Court that providing service to people who receive no service or little service is one of the Commission's basic missions. Thus, recently in *Golden State Broadcasting Corp., supra,* we relied on *Ram* and *Radio Cincinnati, Inc.* v. *FCC*, 117 F.2d 93, 95, 5 RR 2035, 2039 (D.C. Cir. 1949), and reaffirmed that "the provision of a *first* service to a substantial number of people is a coverage factor entitled to great weight and is of a higher priority than the provision of a choice of services." 54 RR 2d at 353. There we awarded a moderate coverage preference because while the winning applicant provided a first nighttime service to some 5,000 persons, the competing applicants would have provided a second nighttime service to some 2,600 persons. Providing service to underserved areas is not merely a matter of engineering efficiency, as Way and the ALJ suggest it also helps achieve the basic mandate of Section 307(b) that the Commission make a "fair" and "equitable" distribution of radio facilities.

13. We recognize that participation of ownership in management of the proposed station is a factor of substantial importance under the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1965); however, providing service to underserved areas is an even more basic factor recognized by the Commission's 1952 television allocation plan which implements the Congressional directive in Section 307(b). Whether a preference for comparative coverage is sufficient to overcome a preference for integration, or the even weightier diversification factor depends on the nature of the coverage. In *Ram* a coverage preference outweighed both a serious diversification preference and an integration preference. Here the number of persons receiving a first service is not as great as it was in *Ram*; nevertheless, significant coverage would be provided to underserved areas: some 2300 persons would receive their first service; 355 their second, and some 14,000 their third and fourth services. These numbers take on added significance when we recall that it has been more than thirty years since the Commission established its television allocation plan and priorities, during which time it has licensed hundreds of television stations. Way, on the other hand, would provide little service to underserved areas. We therefore conclude that FBC is entitled to a significant or substantial preference for superior comparative coverage.[2]

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[2] FBC also excepts to the ALJ's ruling (Memorandum Opinion and Order, FCC 82M–

14. *Summation*: Way has received a slight preference for diversification which borders on the *de minimis* because it is based on an FBC minority (10%) stockholder's two small interests (9.8% and 1.6%) in two stations located a considerable distance from Lexington. Way is also entitled to a substantial integration preference, but we find overpowering merit here to the observation in *Chapman*, *supra*, that a diversification or integration preference may be evanescent whereas coverage to underserved areas is more enduring. In this case, FBC's substantial service to underserved areas, as in *Ram*, is sufficient to outweigh Way's comparative preferences. A grant of FBC's application will better serve the public, much of which receives little or no service at all.

15. ACCORDINGLY, IT IS ORDERED, That the petition for leave to amend filed August 22, 1983 by Way of the Cross Outreach, Inc. IS GRANTED, and the amendment IS ACCEPTED; and

16. IT IS FURTHER ORDERED, That the application of FBC, Incorporated (File No. BPCT-810529KF) for a new commercial television station to operate on Channel 62 at Lexington, Kentucky IS GRANTED, and the application of Way of the Cross Outreach, Inc. (File No. BPCT-810806KK) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH A. MARINO, *Chairman, Review Board*

2299, released July 26, 1982) granting Way's June 23, 1982 petition for leave to amend its financial showing and Way's motion for summary decision on a financial issue specified against it. FBC Br. at 34–46. A full exploration of the alleged "unresolved issues" in Way's bank letters, FBC Br. at 42, could require a remand of this proceeding, which would be a pointless task in light of our ultimate conclusion. We therefore will dismiss FBC's exception as moot and will not remand this issue for further evidence. *See Bay Television, Inc.*, FCC 83R-70, released September 16, 1983, para. 12 (Rev. Bd.).

FCC 83D-8

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FBC, INCORPORATED Lexington, Kentucky	BC Docket No. 82-106 File No. BPCT-810529KF
WAY OF THE CROSS OUTREACH, INC. Lexington, Kentucky	BC Docket No. 82-108 File No. BPCT-810806KK
For Construction Permit	

Appearances

John L. Tierney and *Richard F. Swift*, on behalf of FBC, Incorporated; *Mark W. Amerman*, *Richard G. Gay* and *Barbara R. Feeherry*, on behalf of Way of the Cross Outreach, Inc.; and *Joseph Belisle*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

(Issued: January 31, 1983 Released: February 7, 1983)

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of FBC, Incorporated (FBC) and Way of the Cross Outreach, Inc. (WOC) for a construction permit for a new commercial television broadcast station to operate on Channel 62, Lexington, Kentucky.[1] By *Order* released February 22, 1982, (BC 2291), the Chief, Broadcast Bureau, acting pursuant to delegated authority, designated these applications for hearing in a consolidated proceeding (47 FR 8849, published March 2, 1982) on the following issues:[2]

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[1] Initially the proceeding also included the applications of Kentucky Authority for Educational TV and Lexington Family Television, Inc. The Kentucky Authority voluntarily withdrew its application on May 5, 1982. The Lexington Family application was dismissed with prejudice by *Order* of the Presiding Judge dated August 13, 1982 (FCC 82M-2500).

[2] Those issues relating to Kentucky Authority and Lexington Family have been deleted for the sake of convenience, and the issues have been renumbered. Issues 1 and 2 were resolved in WOC's favor by *Order* released July 26, 1982 (FCC 82M-2299), granting WOC's Motion for Summary Decision, as amended.

(1) To determine, with respect to [WOC], whether there is a reasonable possibility that the tower height and location proposed [in its application] would constitute a hazard to air navigation.

(2) To determine with respect to [WOC]:

(a) whether the applicant has made provision for the costs of land and buildings for studios and offices and, if not, to determine the reasonable additional costs which will be incurred;

(b) whether the applicant has available $1,281,470 plus any additional costs to be incurred for land and studios and offices.

(c) whether, in light of the evidence adduced pursuant to issues (a) and (b), applicant is financially qualified.

(3) To determine, on a comparative basis, which of the proposals would [better] serve the public interest.

(4) To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

2. Prehearing conferences were held on May 4 and June 30, 1982, and hearing sessions were held on July 20 and 21, and on August 12, 1982, and the record was closed by *Order* of the Presiding Judge released September 14, 1982 (FCC 82M-2806). Proposed findings and conclusions were filed by the applicants on October 15, 1982 and replies to proposed findings were filed by the applicants on October 29, 1982.

Findings of Fact

FBC, Incorporated (FBC)

3. FBC is a Kentucky corporation with 1,500 shares of voting, no-par common stock issued and outstanding in the names of ten shareholders, each of whom owns 150 shares (ten percent each) and has subscribed for an additional 4,850 shares each. The officers, directors and stockholders of FBC are as follows:

Name and Address	*Office Held*	*No. of Shares Held*	*Shares Subscribed*	*Percent of Ownership*
Ian N. Wheeler 18212 Cypress Cove Land Lutz, Florida 33549	President/ Director	150	4850	10%
Edgar A. Wallace 125 Constitution Street Lexington, KY 40508	Director	150	4850	10%
Robert J. Rosenstein 3068 Todds Road Lexington, KY 40509	Asst. Secty./ Director	150	4850	10%

Name and Address	Office Held	No. of Shares Held	Shares Subscribed	Percent of Ownership
Stephen Kesten 712 Old Dobbin Road Lexington, KY 40502	V.P./ Director	150	4850	10%
Louise H. Ward 2198 Lakeside Drive Lexington, KY 40502	Director	150	4850	10%
Steven H. Caller 1805 Lakehill Circle Lexington, KY 40502	Treasurer/ Director	150	4850	10%
Irving Rosenstein 1410 Lakewood Drive Lexington, KY 40502	Director	150	4850	10%
James M. Clifton 123 Chinoe Road Lexington, KY 40502	Director	150	4850	10%
Robert S. Miller 2136 Lakeside Drive Lexington, KY 40502	Secretary/ Director	None	None	None
Penny M. Miller 2136 Lakeside Drive Lexington, Ky 40502	Director	150	4850	10%
David B. Stevens, M.D. 346 Jesselin Drive Lexington, KY 40503	Director	150	4850	10%

4. FBC has no interest in any authorized broadcast facility or any other media of mass communications. However, Ian N. Wheeler, a 10 percent stockholder in FBC, has interests in mass communications media. Mr. Wheeler is President, director, General Manager, and owns 9.8 percent of the stock of Family Television Corporation, licensee of WFTS-TV, Channel 28, Tampa, Florida (Tr. 299). Tampa is not within the Grade B predicted service contour of FBC's station in Lexington, and is located over 800 miles from Lexington. There are four television stations licensed to Tampa, eight television services licensed to the Tampa-Clearwater-St. Petersburg market and 14 radio broadcast stations licensed to that market (FBC Ex. 1, p. 2). In addition, Mr. Wheeler also holds a 1.6 percent interest in Delta Television Corpation, licensee of WPTY-TV, Channel 24, Memphis, Tennessee, which is located over 400 miles from Lexington, and is outside the Grade B service contour of FBC's proposed station. There are six other television stations licensed to Memphis, as well as 20

radio stations (FBC Ex. 1, p. 6). In addition, Mr. Wheeler is President, director, and 51 percent stockholder in Wheeler Media Services, Hermitage, Tennessee, a broadcasting consulting firm (FBC Ex. 1, p. 6). The corporation is inactive at the present time and Mr. Wheeler has no intention to reactivate the business (Tr. 324).

5. Of FBC's ten stockholders, three are proposed to be integrated into station management on a full-time or part-time basis, and two others are proposed to work at the station less than part-time should FBC be granted a construction permit.[3] Ian N. Wheeler is proposed to be involved in station management on a full-time basis (40 hours per week), and two principals are proposed to work at the station on a part-time basis - Edgar A. Wallace (30 hours per week) and Robert J. Rosenstein (20 hours per week) (FBC Ex. 1, p. 1; FBC Ex. 3, p. 1; FBC Ex. 4, p. 1). Two FBC stockholders are proposed to work at the station on less than a part-time basis - Stephen Kesten (15 to 20 hours per week) and Louise H. Ward (15 hours per week) (FBC Ex. 2, p. 1; FBC EX. 7, p. 1).

6. *Ian N. Wheeler* was born November 5, 1934, in Huntington, New York. He attended the University of Alabama, from which he received a bachelor's degree in 1957 (FBC Ex. 1, p. 1). Mr. Wheeler, a resident of Lutz, Florida, has promised to move to Lexington if FBC is granted a construction permit. Mr. Wheeler is proposed to be the full-time (40 hours per week) Manager of FBC's station. In that position, Mr. Wheeler will supervise the day-to-day operations of FBC's station (FBC Ex. 1, p. 1).

7. Mr. Wheeler has obtained broadcast experience at several stations. From 1953–1957, Mr. Wheeler was employed part-time for radio broadcast stations WNPT, Northport, Alabama; WGAD, Gadsten, Alabama; and WOWL, Florence, Alabama. From 1956–1957, Mr. Wheeler was senior producer-director for the Alabama Educational Network, licensee of a state-wide network of noncommercial educational television broadcast stations of the University of Alabama. From 1957–1959, Mr. Wheeler served in the U.S. Army as Chief, Television Division, U.S. Army Signal Corps School, Ft. Monmouth, New Jersey. In that capacity he instructed students in the Signal School in various communication areas via closed-circuit television (FBC Ex. 1, pp. 3–5). Mr. Wheeler was Program and Operations Manager at WETA-TV, Washington, D.C. from 1961 to 1964, and assisted in the construction and initial operation of that station. From 1964 to 1966, Mr. Wheeler was employed by the U.S. Department of Health, Education and Welfare. He supervised grants for noncommercial educational television stations. Mr. Wheeler has served as General Manager of KTWU-TV, Channel 11, Topeka,

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[3] Irving Rosenstein, Steven H. Caller, Robert S. Miller, Penny M. Miller, James M. Clifton, and David B. Stevens, M.D. are not proposed to be integrated into day-to-day station management.

Kansas where he supervised the operation of the station, and taught introductory communications courses to first year students at Washburn University. From 1966 to 1968, Mr. Wheeler served as a consultant to the Sunflower Educational Television Association, licensee of KTTS(TV), Channel 8, Wichita, Kansas where he conducted a market survey and helped prepare an application for a construction permit for submission to the FCC. From 1968 to 1974, Mr. Wheeler acted as General Manager of WRET-TV, Charlotte, North Carolina. In that capacity Mr. Wheeler put together the programming for the station and was responsible for the initial development of the station's technical facilities. From 1975 to 1980, Mr. Wheeler was Station Manager, Vice-President and 8 percent stockholder in Reel Broadcasting Company, Inc., licensee of WZTV, Channel 17, Nashville, Tennessee. As Station Manager, Mr. Wheeler was primarily responsible for all matters pertaining to the operation of the station including personnel, technical operations, programming, production, promotion and community relations. From 1980 to 1981, Mr. Wheeler continued as Station Manager for WZTV and was employed by Multi-Media, Inc. which had become the licensee of WZTV. Mr. Wheeler is presently President, director, 9.8 percent stockholder and General Manager of WFTS-TV, Channel 28, Tampa, Florida (FBC Ex. 1, p. 2). Mr. Wheeler has also been a consultant to Family Television Corporation, permittee of Channel 44, Evansville, Indiana. In that position, Mr. Wheeler provided advice on equipment matters and a move of the station's transmitter site (FBC Ex. 1, p. 5; Tr. 75–76 [August 12, 1982]).

8. Mr. Wheeler holds memberships in the following honorary societies: Sigma Delta Chi (Journalism), and Alpha Epsilon Rho (Radio/TV). In addition Mr. Wheeler is a member of the National Association of Broadcasters, the Association of Independent Television Stations, and the National Association of Television Program Executives (FBC Ex. 1, p. 2). From 1959 to 1961, Mr. Wheeler produced "The Bear Bryant Show", supervised the placement of commercial time, purchased syndicated advertising material and produced television commercials as media director and senior account executive at Frank Taylor Advertising, Burmingham, Alabama (FBC Ex. 1, pp. 2, 5).

9. *Edgar A. Wallace* resides in Lexington, Kentucky, where he has lived since 1954, except for a period of time in the early 1960's when Mr. Wallace attended college and school outside of Lexington. Mr. Wallace, a Black male, is sole owner of a insurance company, a liquor store, and a video game arcade (FBC Ex. 4, pp. 1, 2). Mr. Wallace has proposed to work part time (30 hours per week) at FBC's station as Director of Public Affairs, Sports and Local and Regional sales (FBC Ex. 4, p. 1; Tr. 114, 120).

10. Mr. Wallace has served as an Urban County Councilman since 1980 in Lexington. Mr. Wallace has been active in the NAACP

and served as the President of the Lexington-Fayette Branch from 1971–1980. Mr. Wallace was appointed to the Lexington-Fayette County Merger Commission and was elected in 1971 to serve as its Secretary. Mr. Wallace chaired the first Annual Black Arts Festival in 1980 and was president of the Arlington Elementary PTA from 1976 to 1978. In addition, Mr. Wallace served as president of the Community Action Federal Credit Union. Mr. Wallace is a member of the Lexington Jaycees and the Urban League, and is Coordinator of Young Adult Activity in the Church of Christ, where he also serves as Church Treasurer (FBC Ex. 4, pp. 4 and 5).

11. Mr. Wallace serves as a sports announcer and commentator and produces a program for ICW Wrestling, WTVQ-TV, Lexington, Kentucky. In 1982, he served as a volunteer master of ceremonies for WKLE-TV's fundraising telethon in Lexington-Richmond, Kentucky. From 1964–1966, Mr. Wallace worked full-time for WLAP-FM in Lexington, Kentucky as an assistant to the general manager. In that position he helped develop the format of the station and assisted in getting the station on the air. From 1966–1971, he worked part-time at WLAP-FM in programming, announcing, and sales. From 1974–1975, Mr. Wallace worked on weekends at WTVQ-TV, Lexington, producing and announcing a news, weather and sports program. In that position, Mr. Wallace wrote and prepared the stories aired (FBC Ex. 4, pp. 2–3). From 1978–1980, Mr. Wallace owned a one-half interest in a family-published Black weekly newspaper- the "Bluegrass Chronicle," Lexington, Kentucky (Tr. 111). The newspaper is no longer published (Tr. 111).

12. *Robert J. Rosenstein* is a resident of Lexington, Kentucky where he has lived since his birth in 1955, except for an interim period when Mr. Rosenstein was attending high school and college outside of Lexington. Mr. Rosenstein is currently employed as an assistant in commercial property development for Equity Services, Lexington, Kentucky. In addition, Mr. Rosenstein is Vice-President of Shoppers Village Liquors. He manages the day-to-day operation of the ten retail outlets and purchases liquor for the concern (FBC Ex. 3, pp. 1, 2). Mr. Rosenstein is proposed to work part-time (20 hours per week) at FBC's station as its Associate Production Manager (FBC Ex. 3, p. 1).

13. Mr. Rosenstein has worked in photography for his high school yearbook and newspaper. Also, Mr. Rosenstein was employed for several summers by the Kentucky Authority for Educational Television, licensee of WKLE, Channel 46, Lexington-Richmond, Kentucky. In that position, Mr. Rosenstein did on-site photography and preparation of slides, worked with a film crew, assisted with film editing, assisted with technical set-up duties, and operated a video tape camera (FBC Ex. 3, p. 1–2).

14. *Stephen Kesten* currently resides in Lexington, Kentucky, where he has lived for the last 14 years. Mr. Kesten will devote 2

days per week (15 to 20 hours) working at FBC's station in the marketing area (FBC Ex. 2, p. 1).

15. Mr. Kesten has been a member of the Board of B'Nai B'rith Lodge No. 289, Lexington, Kentucky for more than 10 years and has held every elective office of that organization. In addition, he has been a member of Temple Adath Israel in Lexington, Kentucky for 14 years, has been a member of the Board of that organization for the last 6 years, and has been chairman of the budget and finance committee for 4 years. Mr. Kesten has worked in the political campaigns of candidates for state and federal office (FBC Ex. 2, p. 2).

16. *Louise H. Ward* resides in Lexington, Kentucky, where she has lived since 1979. Ms. Ward is proposed to work 15 hours per week at FBC's station as finance officer and controller, once FBC's station begins operation (FBC Ex. 7, p. 1).

17. Ms. Ward has worked in the Versailles Presbyterian Church in the Lexington area as Director of Youth Activities and Youth Choir, sunday school teacher, Vacation Church School Director and substitute organist. In addition, Ms. Ward served as director of a summer day camp on the church grounds for under-privileged children and served as a volunteer in local children's library programs. In addition, Ms. Ward participated in the design of an advertising campaign for her former husband in his efforts to seek state elective office (FBC Ex. 7, pp. 1, 2).

Way of the Cross Outreach, Inc. (WOC)

18. WOC is a nonprofit, nonstock Kentucky Corporation of good standing which was incorporated on July 11, 1977, and is authorize to engage in the business of television broadcasting. WOC is a tax exempt organization pursuant to Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, and is publicly supported (WOC Ex. 1, p. 1; WOC Ex. 11).

19. WOC is controlled by a Board of Trustees. Decisions are made in accordance with a majority vote of the Board of Trustees. Officers are elected by the Board of Trustees. The officers and trustees of WOC are as follows:

Edward C. Bowlds	President and Trustee
Dorothy M. Bowlds	Secretary and Trustee
Robert M. Morgan	Vice-President/Treasurer and Trustee
Dr. Sewell Woodward, Jr.	Assistant Secretary and Trustee
Connie L. Mitchell	Trustee
Carrie M. Minton	Trustee

(WOC Ex. 1, p. 1).

20. Neither WOC nor its officers or directors of have any ownership interest in any authorized broadcast facility or any other media of mass communications (WOC Ex. 2, p. 1). Edward C. Bowlds and Dorothy M. Bowlds, trustees of WOC, are also trustees of Way of

the Cross Television, Inc. which produces television programming on a contract basis and produces "TFJ Club", a Christian talk/variety show. Way of the Cross Television, Inc. has purchased program time for "TFJ Club" in various cities. Over the past 18 months, four programs of the "TFJ Club" have been produced by Way of the Cross Television, Inc. These programs have been aired on television in Greenville, South Carolina and Lexington, Kentucky. In addition, Way of the Cross Television, Inc. has video-taped one program for a church in Lexington, Kentucky and directed a program for a church in Harrisonville, Missouri. Way of the Cross Television, Inc. did not air either of those two programs. All activities, including television production activities of Way of the Cross Television, Inc. will cease prior to commencement of station operations by WOC. However, it is anticipated that WOC will produce and air "TFJ Club" programs on its station in Lexington (WOC Ex. 2, p. 1). WOC Trustee Carrie Minton occasionally is host of a cable program on the local public access channel on a cable system in the Louisville area. Mrs. Minton's involvement with this activity will cease prior to commencement of station operations by WOC (WOC Ex. 2, p. 1).

21. All six trustees of WOC will be actively involved in station management should WOC be granted a construction permit. Edward C. Bowlds, Dorothy M. Bowlds, Connie L. Mitchell, and Carrie B. Minton will be involved in station management on a full-time basis (40 hours per week) and Dr. Sewell Woodward, Jr. and Robert M. Morgan will work at the station on a part-time basis (20 hours per week) (WOC Ex. 3, pp. 1–3; WOC Ex. 6, p. 4). In addition, Mr. Bowlds, Mrs. Bowlds, Miss Mitchell, Mrs. Minton, Dr. Woodward and Mr. Morgan will serve on the station Programming Committee, which will evaluate the station's programming, and determine needs for future programming (WOC Ex. 3, p. 3).

22. *Edward C. Bowlds*, born May 2, 1940, in Ohio County, Kentucky, is President and a Trustee of WOC. He has been resident of Lexington, Kentucky, since September 1980 (WOC Ex. 4, p. 1). Mr. Bowlds will be the full-time (40 hours per week) Station Manager of WOC's proposed station (WOC Ex. 2, p. 1). As Station Manager, Mr. Bowlds will supervise all aspects of station operations (WOC Ex. 3, p. 1). Mr. Bowlds will reduce any of his outside activities to the extent that they interfere with his full-time commitment to WOC (WOC Ex. 4, p. 2).

23. In 1977, Mr. Bowlds and his family moved to Prestonsburg, Kentucky and started a Christian ministry that included a Christian bookstore, a counselling service and a Christian television talk/variety show, the "TFJ Club" (WOC Ex. 4, p. 1).[4] Mr. Bowlds

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[4] Mr. Bowlds has been the producer and host of the "TFJ Club" since its inception in 1977 and until the present time. The "TFJ Club" includes guests who sing, perform, and give Christian testimony (Tr. 200–201). The "TFJ Club" was

started the ministry to help people who were on alcohol and other drugs. Mr. Bowlds worked with the local rehabilitation center and also counseled persons when asked to by law enforcement authorities (Tr. 155–56, 191–92). Mr. Bowlds had no formal training as a counselor but gained his experience from the school of hard knocks (Tr. 192).[5] Mr. Bowlds has never been compensated for his counselling services (Tr. 192). In 1979, Mr. Bowlds moved to Louisville and continued his ministry activities in counseling and the "TFJ Club". In 1980, Mr. Bowlds moved to Lexington where he is currently engaged in full-time Christian ministry as a lay minister, including his activities on behalf of WOC (WOC Ex. 4, p. 1–2). Mr. Bowlds does not receive a salary for his services. Essentials such as his home, which also serves as his office is provided by the ministry (Tr. 219–23).

24. From November, 1980 until early July, 1981, Mr. Bowlds was employed on a temporary basis by WCLF-TV, Channel 22, Clearwater, Florida, as a host of a weekly television talk/variety show, and as coordinator of the Jesus U.S.A.S.E. '81 Festival which was held in Tampa, Florida. This festival was a gathering of Christians for singing, preaching and other Christian entertainment. As coordinator for this festival, Mr. Bowlds was responsible for obtaining use of the fairgrounds, obtaining contracts from the numerous speakers and performers, supervising the various department heads of the festival, obtaining volunteers from local churches to work at the festival and developing promotional materials (WOC Ex. 4, p. 1–2; Tr. 174–75, 203–05). During this period of time, Mr. Bowlds traveled back and forth several times per month between Clearwater, Florida and Lexington, Kentucky (Tr. 208–10, 238–40). Much of the work he did for WCLF-TV was done from Lexington, his permanent residence (Tr. 208–10, 213–14).

25. *Dorothy M. Bowlds*, wife of Edward C. Bowlds, was born September 15, 1943 in Ohio County, Kentucky (WOC Ex. 5, p. 1). Mrs. Bowlds moved to Prestonsburgh, Kentucky in 1977 with her family, and was employed as Activity Director at the Riverview Manor Nursing Home. In that position, Mrs. Bowlds planned and coordinated all activities for nursing home residents, supervised and recruited volunteers, and coordinated the religious services at the nursing home. Mrs. Bowlds resigned that position when she moved to

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originally aired one-half hour per week, later expanded to an hour per week, and for a brief period was aired five days per week. (WOC Ex. 4, p. 1; Tr. 195–96). Mr. Bowlds has received no compensation for his services in connection with this program (Tr. 196–97).

[5] Mr. Bowlds testified that following his graduation from high school in 1958 and until 1975, he traveled extensively throughout the country, worked at various odd jobs from time to time, drank heavily and spent a considerable part of his time gambling (Tr. 146–47, 154, 175–79). In 1975, Mr. Bowlds embraced religion and stopped drinking and gambling (Tr. 147–48, 155–56). No evidence has been offered indicating that Mr. Bowlds has reverted to his former lifestyle.

Louisville in 1980 to assist her husband in Christian ministries (WOC Ex. 5, p. 1). From September 1980 to the present, Mrs. Bowlds has been a resident of Lexington, Kentucky.[6] Mrs. Bowlds is currently a housewife and assists in her husband's ministry "as needed." She will reduce her outside activities to the extent necessary to fulfill her full-time commitment to WOC (WOC Ex. 5, p. 2).

26. Mrs. Bowlds will be the full-time (40 hours per week) Production Director of the WOC station. As Production Director, Mrs. Bowlds will supervise all technical personnel involved in production of local programming, including audio, video, and lighting staff. In addition, Mrs. Bowlds will oversee scheduling or production time, prepare work schedules of all production personnel, and be responsible for all production equipment (WOC Ex. 3, p. 1). Mrs. Bowlds' position as Production Director will also include scheduling and production of commercials for the station and she will supervise all the personnel working in the production department (Tr. 248). As part of her efforts to prepare for her duties at WOC station, Mrs. Bowlds attended a course given by Storer Cable, Covington, Kentucky, on the operation of a "mini-cam" camera. Mrs. Bowlds received a certificate of merit in March 1982 when she completed the "mini-cam" course (WOC Ex. 5, p. 2; Tr. 40–41). Mrs. Bowlds has operated a studio camera for WCLF-TV on a volunteer, short-term basis. In addition, Mrs. Bowlds operates a television camera for productions of the "TFJ Club" (Tr. 249).

27. *Connie L. Mitchell*, a Black female, was born October 17, 1946, in Lexington, Kentucky. She proposes to devote her full-time to the operation of the proposed station in the event that WOC is the successful applicant in this proceeding (WOC Ex. 6, pp. 1, 4). She will hold the position of Director of Public Affairs and in that capacity will host public affairs programs including interview and talk shows, contact guests for the public affairs programs, contact the public regarding programs directed to the needs and interests of the community, coordinate program plans with the staff, develop a "media kit," seek to develop promotional materials and schedule tours of the station (WOC Ex. 3, pp. 1–2).

28. Ms. Mitchell has lived most of her life in Lexington, attending elementary and secondary schools and college there. She received a Bachelor of Arts in Elementary and Special Education in 1969 from the University of Kentucky and a Master of Arts Degree in that field from Eastern Kentucky University, Richmond, Ken-

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[6] From November 1, 1980 through July 4, 1981, Mrs. Bowlds was temporarily employed by WCLF-TV, Channel 22, Clearwater, Florida to assist him as receptionist in connection with the Jesus U.S.A. Southeast Festival. During that period of time, she along with her husband, traveled back and forth between Clearwater and Lexington several times a month. The station rented an apartment for their use during their visits to Clearwater (Tr. 238–40).

tucky in 1974. She has been employed for twelve years by the Fayette County Board of Education and presently teaches at the James Lane Allen Elementary School in Lexington (WOC Ex. 6, p. 1). Ms. Mitchell has no broadcast experience (Tr. 224–225). In the event WOC is the successful applicant in this proceeding, she will resign her position with the Fayette County Board of Education (WOC Ex. 6).

29. From 1970 to 1980, Ms. Mitchell was active in several civic, charitable and church activities for various periods of time, including membership in the Urban League, The National Organization of Women, the N.A.A.C.P., the Y.W.C.A., Delta Sigma Theta Sorority, Board Member of the Fayette County Education Association; and participated in several activities of the United Methodist Church. In addition, she is a member of the Board of Directors of the Kentucky Educational Association, Central District; a life member of the National Education Association; a member of the Fayette County Education Association; and a Forum Representative at the James Lane Allen Elementary School (WOC Ex. 6).

30. *Carrie B. Minton,* the sister of Edward Bowlds, was born, raised, and attended elementary and high school in Ohio County, Kentucky. Mrs. Minton presently resides in Louisville, Kentucky, and will move to Lexington prior to commencement of station operations by WOC. Mrs. Minton is 55 years old, married, and the mother of four children, none of whom remain at home (WOC Ex. 7, p. 1).

31. Mrs. Minton will work full-time (a minimum of 40 hours per week) as Program Director of WOC's station. In that position, Mrs. Minton will supervise the tape librarians, will ensure that all tapes are aired as scheduled, and will maintain a record of available programming time periods and the applicable rates for the use of management staff and sales persons (WOC Ex. 3, p. 2). Mrs. Minton will reduce any of her outside activities to the extent that they interfere with her full-time (40 hours per week) commitment to WOC (WOC Ex. 7, p. 1).

32. *Dr. Sewell Woodward, Jr.,* who is sixty years old, who was born, raised and graduated from high school in Lexington, Kentucky. Dr. Woodward, a resident of Lexington, has lived in Lexington approximately 18 of his 50 years. Dr. Woodward received a B.A. degree from Asbury College, Wilmore, Kentucky (1954), a Master of Divinity Degree from College of the Bible, Lexington, Kentucky (1958), a Doctor of Ministry Degree from Lexington Theological Seminary, Lexington, Kentucky (1973) and a Clinical Pastoral Educational Certificate from Appalachian Regional Hospital, Harlan, Kentucky (1972). Dr. Woodward's most recent period of residence in Lexington commenced in 1978 when he accepted a position as Senior Minister of Centenary United Methodist Church, Lexing-

ton, Kentucky. The church has over 2,300 members and has 14 staff members (WOC Ex. 8, p. 1).

33. Dr. Woodward will be employed part-time (20 hours per week) as Director of Ministries for WOC's station. Dr. Woodward will be responsible for WOC's community involvement projects. Specifically, Dr. Woodward will recruit minority and disadvantaged persons who seek to be trained in television broadcasting. Dr. Woodward will also have direct supervision over all counselors, including volunteers working at the station. In addition, Dr. Woodward will be responsible for counseling and ministering to the staff of the station (WOC Ex. 3, pp. 2–3).

34. Dr. Woodward's civic and Christian activities include his membership in the Lexington Kiwanis Club and the Lexington Ministerial Alliance, and his participation in Boy Scout activities in Lexington. In addition, Dr. Woodward is a member of the Wesley Foundation, University of Kentucky, and is retiring this June as a Board Member of the Methodist Children's Home, Lexington, after a 10-year tensure. In addition, Dr. Woodward has taken special training and done counseling in drugs at the Federal Narcotics Hospital, Lexington, Kentucky (WOC Ex. 8, p. 1).

35. Dr. Woodward's position as Senior Minister of Centenary United Methodist Church has generally flexible hours, as will his position as Director of Ministries for WOC. Dr. Woodward anticipates working at the station on a daily basis, Monday through Saturday, to fulfill his 20-hour-per-week commitment to WOC (WOC Ex. 8, p. 2).

36. *Robert M. Morgan* born May 22, 1940, was raised and graduated from high school and college in the Baton Rouge, Louisiana area. Mr. Morgan has lived in Lexington since 1973, and has been employed in a data processing position with the Kentucky State government since 1974 (WOC Ex. 9, p. 1). Mr. Morgan will serve as the part-time (20 hours per week) Sales Manager of the station. In that position, Mr. Morgan will be responsible for setting sales policy, developing marketing strategy (with input from WOC's Board of Trustees), developing marketing programs, and will have direct supervision of the sales staff. In addition, Mr. Morgan will consult with members of the station staff on financial accounting and data processing requirements (WOC Ex. 3, p. 3).

37. Mr. Morgan is Secretary of the Lexington Business and Professional Couples Club and holds the offices of Director of Evening Music, member of the Pastor Parish Relations Committee; member of the Finance Committee and Chancel choir; and Supervisor of the Audio System at the Centenary United Methodist Church (WOC Ex. 9, p. 1). Mr. Morgan plans to curtail his non-work-related activities to the extent that they interfere with his part-time commitment to the station (WOC Ex. 9, p. 2).

Comparative Coverage

38. Each applicant proposes to construct a UHF television station to operate on Channel 62 at Lexington, Kentucky. FBC proposes to operate from a transmitter site on Royster Road, approximately five miles east of Lexington, with an effective radiated power of 2,360 kW and a height above average terrain of 1,035 feet. WOC proposes a different transmitter site approximately three miles southwest of the FBC site, with an effective radiated power of 5,000 kW and a height above average terrain of 679 feet (FBC Ex. 12, pp. 1, 10, 12).

39. Operating as proposed, FBC would provide a primary service (Grade B) to an area encompassing 7,124 square miles, with a population of 673,227. WOC's Grade B proposal encompasses 6,536.5 square miles, with a population of 650,852. The common area served by both includes 6,444 square miles and 646,988 persons. Thus, FBC would provide an additional Grade B service to 587.5 more square miles and 22,375 more persons than would WOC. A comparison of the area and populations which would (or would not) receive a first, second, third or fourth Grade B television service from the respective proposals of the two applicants is as follows (FBC Ex. 13, pp. 4–5):

	FBC Proposal		*WOC Proposal*	
	Area (Sq. Mi.)	*Population*	*Area (Sq. Mi.)*	*Population*
First Television Service	59.0	2,309	0	0
Second Television Service	6.2	355	0	0
Third Television Service	167.0	4,556	4.1	138
Fourth Television Service	184.2	9,592	8.5	282
Total	416.4	16,812	12.6	420

CONCLUSIONS

40. This proceeding involves the mutually exclusive applications of FBC and WOC to construct a new commercial television broadcast station in Lexington, Kentucky. The only question to be resolved is the standard comparative issue. That issue must be decided in accordance with the Commission's *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). The Policy Statement sets forth two major goals toward which the comparative process is to be directed, *i.e.*, (a) the best practicable service to the public and (b) a maximum diffusion of control of the media of mass communications.

Diversification of Control of the Media of Mass Communications

41. WOC and its principals do not own any media interests. Edward C. Bowlds and Dorothy M. Bowlds are trustees of Way of the Cross Television, Inc., an entity which has produced television programming. However, a production company is not considered a

medium of mass communications for the purpose of comparative evaluation, absent specific proof, not developed in this proceeding, that such activity undermines the objectives underlying the principle of diversification of control of mass media. *Morris, Pierce & Pierce*, 88 FCC 2d 713, 723, 724 (Rev. Bd. 1981). In addition, Way of the Cross Television, Inc. will cease all activities including television production activities prior to commencement of station operation by WOC. Carrie Minton's occasional activities as host of a cable program on the local public access channel in the Louisville area, which will also cease prior to commencement of station operations by WOC, does not impact, for diversification purposes, upon WOC. FBC has no media interests. However, Ian N. Wheeler, a 10% stockholder in FBC, has a 9.8% stock interest in the licensee of WFTS-TV, Channel 28, Tampa, Florida and a 1.6% interest in the licensee of WPTY-TV, Channel 24, Memphis, Tennessee. Both stations are located outside the Grade B contour of FBC's proposed station. Under the diversification criterion, media holdings in the proposed community of license are generally of the most significance, followed by holdings in the remainder of the proposed service area and then on the regional and national level. *Policy Statement*, 1 FCC 2d at 394–5. Since Mr. Wheeler's broadcast station ownership interests are far from controlling (9.8% and 1.6%) and given the fact that these stations are located outside the Grade B contour of FBC's proposed station, WOC warrants only a slight diversification preference over FBC.

Best Practicable Service To The Public
Integration Of Ownership And Management

42. In determining which applicant will insure the best practicable service to the public, consideration must be given to the degree of integration of ownership and management and to the attributes of the participating owners—including such matters as broadcast experience, local residence and past participation in civic affairs. Participation in station operation by owners is considered by the Commission to be a factor of substantial importance because "[i]t is inherently desirable that legal responsibility and day-to-day performance be closely associated." *Policy Statement*, *supra*, at 395. The Commission is primarily interested in full-time participation. To the extent that the time spent moves away from full-time, the credit given drops sharply, and no credit is given to the participation of any person who will not devote to the station substantial time on a daily basis. *Id*. Thus, no credit is given where a principal proposes to work fewer than 20 hours per week. *Midwest Broadcasting Company*, 70 FCC 2d 1489 (Rev. Bd. 1979), *review denied*, FCC 79-397, released June 22, 1979. In this connection, where a work proposal has been stated in terms of a minimum and maximum amount of time, only

the minimum time will be credited, since the commitment can be met with the lesser number of hours. *Midwest, supra.*

43. FBC proposes to integrate three of its ten stockholders into station management. Ian N. Wheeler (10% interest) is proposed as full-time manager. Robert J. Rosenstein (10% interest), the proposed Associate Production Manager, intends to devote twenty hours per week to the station. Edgar A. Wallace (10% interest) the proposed Director of Public Affairs, Sports, and Local and Regional Sales, intends to devote thirty hours per week to the station. Thirty hours per week qualifies as substantial but not full-time. *Van Buren Community Service*, 87 FCC 2d 1018, 1021 (Rev. Bd. 1981). FBC is also claiming credit for the participation of Stephen Kesten (10% interest) who proposes to work 15–20 hours per week and Louise H. Ward (10% interest) who proposes to work 15 hours per week. Neither is entitled to integration credit. *Midwest, supra.* Both, however, are entitled to an award of slight residual merit for local residence and civic participation since they intend to devote some time to station affairs. *Midwest, supra.* FBC will, therefore, receive credit for 10% full-time integration, 10% substantial (30 hours) integration, and 10% part-time (20 Hours) integration. FBC will also receive slight residual merit because of the proposed participation of Mr. Kesten and Ms. Ward.

44. FBC's integration policy is qualitatively enhanced in that Mr. Wheeler (10% interest) has broadcast experience and intends to move to Lexington. Proposed future residence is also accorded weight although to a lesser degree than present local residence. *Policy Statement*, 1 FCC 2d at 396. In addition, FBC also receives a plus-factor for 10% participation by a minority owner (Edgar A. Wallace) and additional qualitative credit for Mr. Wallace's local residence, past participation in civic affairs, his broadcast experience and Robert J. Rosenstein's (10% interest) local residence.

45. WOC is a non-profit, non-stock corporation and has a Board of six trustees. WOC is controlled by the Board of Trustees and decisions are made by a majority of the Board. It is well established that board members of a non-stock corporation are treated as owners for integration purposes. *Minneapolis Star and Tribune, Co.*, 88 FCC 2d 1604 (Rev. Bd. 1982); *Farragut Television Corporation*, 5 FCC 2d 93, 98 (Rev. Bd. 1966); *Loyola University*, 12 RR 1017 (1956); *City Of Jacksonville*, 12 RR 113 (1956); *Triad Television Corp.*, 25 FCC 848 (1958); *The Toledo Blade Co.*, 25 FCC 251 (1958); *Sucesion Luis Pirallo-Castellanos*, 26 FCC 109 (1959); *Florida Gulfcoast Broadcasters*, 32 FCC 197 (1962). FBC argues that a non-profit, non-stock corporate applicant has an additional burden to prove that its trustees or directors have made the types of investments which would be comparable to shareholders in a stock corporation. A reading of the cases cited, *above*, does not support FBC's theory. These cases make clear that in non-profit, non-stock corporation

situations, individuals holding relationships of personal interest and responsibility comparable to those of principals are treated as owners for integration purposes "although acquired by entrustment rather than financial investment" *Triad*, *supra*, 25 FCC 848 at 1021. Thus, contrary to FBC's contention, the fact that WOC's principals have not contributed capital to the corporation or that the loan commitments to WOC require several guarantors who are not WOC principals has no bearing on whether WOC should receive integration credit. WOC's entitlement to integration credit turns on the nature and extent of WOC's trustees' involvement in the day-to-day operation of the proposed station.

46. WOC is entitled to quantitative credit for 66.7% full-time integration since four of its six principals, Edward C. Bowlds (16.7%), Dorothy M. Bowlds (16.7%), Connie L. Mitchell (16.7%), and Carrie B. Minton (16.7%) propose to work at the station full-time (40 hours per week) in management positions. Mr. Bowlds will work at the station as Station Manager, Mrs. Bowlds as Production Director, Miss Mitchell as Director of Public Affairs, and Mrs. Minton as Program Director. WOC will also be credited with 33.3% part-time integration since its remaining two principals, Dr. Sewell Woodward, Jr. (16.7%) and Robert M. Morgan (16.7%) are both proposed to work at the station 20 hours per week in management positions. Dr. Morgan will be Director of Ministries and Mr. Morgan will be sales manager. FBC questions Mr. Bowlds' ability to effectuate his integration proposal. FBC points to the events in his life prior to 1975 and asserts that "[d]espite his conversion to religion in 1975, his history since that time reveals little more stability and no more responsibility than his life before then" (FBC Conclusions, Paragraph 102). FBC contends that Mr. Bowlds is unstable and irresponsible since he has held no gainful employment since 1975, other than for a temporary period of approximately eight months promoting the Florida religious festival, and is dependent upon the tax-free charitable contributions made by others to WOC. FBC's contentions may be summarily dismissed. Mr. Bowlds' conduct prior to 1975 is remote in time and there is no evidence that Mr. Bowlds has reverted to his former lifestyle. On the contrary, the evidence indicates that Mr. Bowlds' conduct since 1975 has been exemplary. Mr. Bowlds has been a Christian lay minister since 1975. It is not unusual for individuals involved in full-time charitable endeavors to rely on charitable contributions from the public for their support. FBC's criteria would condemn as unstable and irresponsible all those involved in full-time charitable endeavors as well as all members of the clergy. FBC also questions the integration proposals of Dorothy Bowlds and Carrie Minton. FBC argues that Mr. Bowlds is the "brain child" of the application and "enlisted his wife and his sister, Mrs. Minton, to become Trustees of WOC, thus establishing a family sinecure within which their interests are protected" (FBC Conclu-

sions, Paragraph 101). There is no record evidence to support FBC's speculation that a "sinecure" will be established. Initially, only three of the six WOC trustees have any familial relationship, and there is no record evidence to suggest that Mr. Bowlds exercises any degree of control over the corporate decisions of his wife, his sister, or over any other WOC trustee. Edward Bowlds, Dorothy Bowlds and Mrs. Minton have pledged to work in management positions at WOC's station on a full-time basis and no evidence has been presented indicating that these commitments will not be carried out. More than unwarranted speculation is necessary to deny credit for a principal's commitment to be integrated into station management. *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982).

47. The qualitative attributes of WOC's integrated owners enhance its proposal. Specifically, five of WOC's integrated principals—Mr. Bowlds, Mrs. Bowlds, Miss Mitchell, Dr. Woodward and Mr. Morgan are local residents. WOC's remaining principal, Carrie B. Minton, has promised to move to Lexington prior to commencement of station operations. Also, Miss Mitchell, Dr. Woodward and Mr. Morgan receive credit for past participation in civic affairs. WOC also receives credit for minority ownership since one of its principals, Miss Mitchell is Black. WOC's quantitative integration credit is also enhanced because three of its six trustees, namely Miss Mitchell, Mrs. Bowlds, and Mrs. Minton are female. WOC also receives slight enhancement credit for the broadcast experience of Mr. Bowlds.

48. In summary, FBC is entitled to 10% full-time, 10% substantial, and 10% part-time quantitative integration credit. In contrast, WOC is entitled to 66.7% full-time and 33.3% part-time quantitative integration credit. Since WOC intends to integrate all of its principals, WOC's integration proposal, unlike FBC's proposal, furthers the Commission goal of maximum ownership participation in station affairs. See *Policy Statement, supra,* at 395; *Pleasant Broadcasting Co.*, 40 FCC 2d 582, 587 (Rev. Bd. 1973); *Gilbert Group, Inc.*, 50 RR 2d 81, 92 (Rev. Bd. 1981). WOC warrants a substantial preference on the quantitative aspect of the integration criterion. It is settled that qualitative attributes of participating owners may enhance the value of an integration proposal but may not overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.* 87 FCC 2d 1010, 1022 (Rev. Bd. 1981). Moreover, WOC's advantage under the integration element is enhanced, rather than lessened, when the qualitative aspects of WOC's proposal are compared with that of FBC.

Comparative Coverage

49. FBC's Grade B coverage includes 22,375 more persons and an area of 587.5 more square miles than WOC would cover. FBC will

offer a first Grade B television service to 2,309 persons within 59.3 square miles; a second Grade B television service to 355 persons within 6.2 square miles; a third Grade B television service to 4,556 persons within 167.8 square miles; a fourth Grade B television service to 9,592 persons within 184.2 square miles; and a fifth or more Grade B service to 9,727 persons within 262.5 square miles. WOC's proposal includes no first or second Grade B service, WOC will provide a third Grade B television service to 138 persons within 4.1 square miles; a fourth Grade B television service to 282 persons within 8.5 square miles; and a fifth or more Grade B service to 3,444 persons within 79.9 square miles. Standing alone, FBC's proposal to bring a new service to approximately 22,000 more persons would warrant only a slight preference. However, providing a first or second service is a factor of considerable significance. *CJL Broadcasting, Inc.*, 88 FCC 2d 750 (Rev. Bd. 1982); *Communications Properties, Inc.*, 52 RR 2d 981 (Rev. Bd. 1982). WOC does not propose to provide a first or second television service. In contrast, FBC will provide a first television service to 2,309 persons and a second television service to 355 persons, and is therefore entitled to a moderate preference. *Communications Properties, supra*;[7] see also Minneapolis Star & Tribune Company, 88 FCC 2d 1604 (Rev. Bd. 1982).

Final Compartive Evaluation

50. WOC has received a slight diversification preference and a substantial preference for integration. FBC has received a moderate preference for comparative coverage. Integration is a factor of substantial importance because of its direct relationship to the licensee's sensitivity to community needs which goes to the essence of the obligation to serve the public interest. Comparative coverage, by contrast, is less directly related to the policy statement objective since it goes to the technical efficiency of the proposal. *WLCY, Inc.*, 17 FCC 2d 338, 346 (Rev. Bd. 1969). Moreover, WOC's integration preference is substantial while FBC's comparative coverage preference is moderate. WOC's preferences for diversification and integration easily outweigh FBC's single preference for comparative coverage. See *WLCY*, *supra*; see also *Town & Country Radio, Inc.*, 70 FCC 2d 572, 576–77 (Rev. Bd. 1978). FBC cites *Ram Enterprises*, 57 FCC 2d 844 (Rev. Bd. 1976) for the proposition that its comparative coverage advantage outweighs the diversification and integration preferences awarded to WOC. *Ram* is factually distinguishable. The integration proposal of the losing applicant in Ram (25% full-time) was far inferior to that proposed by WOC (66.7 full-time and 33.3% part-time). In addition, the coverage proposal of the winning applicant in *Ram* (first aural service to 5000 persons daytime and 10,000 persons

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[7] In *Communications Properties*, a moderate preference was awarded where an applicant proposed a second nighttime service to 4,456 people.

nighttime) was superior to that proposed by FBC (first television service to 2,309 persons and a second television service to 355 persons). Therefore, *Ram* does not require a different result. It is concluded that a grant of WOC's application will better serve the public interest, convenience and necessity.

Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the rules, the application of Way of the Cross Outreach, Inc. IS GRANTED and the application of FBC, Incorporated IS DENIED.[8]

FEDERAL COMMUNICATIONS COMMISSION
JOSEPH CHACHKIN, *Administrative Law Judge*

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[8] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Employment, Equal Opportunity Rule, Compliance With
Petition to Deny
Renewal

Applications for renewal of licenses granted. Petition to deny denied. Licensee has complied with Commission's EEO requirements and no substantial and material question of fact exists with regard to licensee's EEO record.
–Franklin Communications

FCC 83-406

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
FRANKLIN COMMUNICATIONS, INC.	
For Renewal of Licenses of Stations WVKO (AM)	File No. BR-820525ZU
and	
WSNY-FM, Columbus, Ohio	File No. BRH-820525ZV

MEMORANDUM OPINION AND ORDER

(Adopted: September 9, 1983 Released: September 20, 1983)

BY THE COMMISSION:

1. The Commission has before it: (i) the above-captioned timely filed renewal applications of Franklin Communications, Inc. ("FCI" or "licensee"), for Stations WVKO(AM) and WSNY-FM, Columbus, Ohio; (ii) a petition to deny those renewal applications timely filed on August 30, 1982, by a group of individuals who reside in the service areas of and regularly listen to WVKO(AM) and WSNY-FM; (iii) an opposition to the petition to deny filed by FCI on September 16, 1982; and (iv) a reply to the opposition filed by the petitioners on September 24, 1982.

2. The petitioners assert that the license renewal applications for WVKO(AM) and WSNY-FM should be denied because the licensee "abandoned" its "target audience," the Black community of Columbus, Ohio, in that it allegedly reduced non-entertainment programming aimed at Blacks on WVKO(AM) and eliminated all non-entertainment programming aimed at Blacks on WSNY-FM. With regard to the reductions on WVKO(AM), the petitioners state

that the licensee "drastically" reduced local news coverage; substantially curtailed use of Black news networks; eliminated "Urban League Focus Commentaries" and a locally produced program entitled "Up Front"; eliminated live remote news coverage and live remote church service broadcasts; and eliminated live remotes and public service announcements (psa's) concerning voter registration activities. Although the petitioners concede that licensees have broad discretion in their selection of programming, they assert that "where the licensee has chosen its 'target audience' as the object of its non-entertainment programming it cannot then turn around and fail to address the real needs of that audience."

3. In opposition, FCI observes that in *Deregulation of Radio*, 84 FCC 2d 968, *reconsideration denied*, 87 FCC 2d 797 (1981), *aff'd. in part and remanded in part sub nom. Office of Communication of the United Church of Christ, et al.* v. *F.C.C.*, __ F. 2d __ (D.C. Cir. No. 81–1032, May 10, 1983), the Commission broadened the already wide discretion vested in licensees to select the subject matter and format of its non-entertainment programming. FCI asserts that any changes in the non-entertainment programming on either station were based on its good faith journalistic and/or business judgment, and were clearly within its discretion. The licensee also states that many of the allegations of programming changes made by the petitioners are erroneous, distorted or irrelevant. Specifically, the licensee states that it had, in fact, increased the amount of local news coverage on WVKO(AM) and had hired an additional full time news reporter/editor (a Black woman) for the AM station. FCI provides a schedule of its daily news broadcasts on WVKO(AM). The licensee also states that it had subscribed to two national Black news networks, but this was considered redundant and unnecessary. Thus, one was canceled. FCI continues to subscribe to the "National Black Network." The licensee further states that the "Urban League Focus Comentaries" were eliminated by the previous licensee over two months before FCI took control of the stations. With regard to the live "Up Front" program, live remote news broadcasts and live remote church services, FCI states that these programs were eliminated because the licensee wished to utilize recorded programming instead, and cites the recorded programming which it has chosen to broadcast, including two hours of church services every Sunday morning, and news/public affairs programming directed towards the Black audience presented on a daily ("Black Viewpoint", "WVKO Reports", Commentary by Carl Rowan), and weekly ("Perspective", "In Black America", "Black Issues and the Black Press") basis. Finally, the licensee states that psa's concerning voter registration activities are now broadcast with greater frequency, the only difference being that they are now made by the licensee's employees rather than by individuals from the community. With regard to WSNY-FM, the licensee cites news and religious program-

ming directed specifically to the Black community as well as general interest news/public affairs programming. In its reply to FCI's opposition, the petitioners fail to address the specific programming cited by the licensee. Instead, the petitioners concede in their reply that there has been a "proliferation of non-entertainment programming" on WVKO(AM), but assert that the "issue" is "WSNY-FM's abandonment of its 'target audience.'"

4. The petitioners' arguments concerning the licensee's "abandonment" of its "target audience" are without merit. The Commission has recently reaffirmed and broadened the discretion vested in each licensee to select programming to fulfill its responsibility to operate in the public interest. *Deregulation of Radio, supra*. In that Order, the Commission stated that licensees *may, if they wish*, focus their non-entertainment programming on a narrow portion of the listening audience rather than the population of the entire service area. *Id.*at 990-992.[1] However, the Commission specifically "*stress[ed]* that stations are *not required to specialize* . . . ." (Emphasis added). *Deregulation of Radio, reconsideration denied, supra* at 816. Thus, the fact that a licensee (or the licensee's predecessor) may at some point determine to direct its non-entertainment programming at a particular "target audience" does not in any way abridge the discretion of that licensee to subsequently determine to broaden the focus of its non-entertainment programming.

5. As the Commission stated in *Deregulation of Radio, reconsideration denied, supra* at 815, commercial radio licensees still have a "general obligation to offer programming responsive to community issues," but

> [t]he focus of our inquiry in the case of a challenge to license renewal will be upon the reasonableness of the licensee's exercise of its discretion . . . [A] hearing is required only where a substantial and material question of fact is raised as to whether the licensee abused its broad discretion by acting *unreasonably* or in bad faith.

In such a situtation, the burden is upon a petitioner to provide specific detailed information to show that a licensee has so acted. *Id.*at 819. See also, *Evening Star Broadcasting, Co.*, 27 FCC 2d 316 (1971), *aff'd sub nom. Stone* v. *F.C.C.*, 466 F. 2d 316, rehearing *denied*, 466 F. 2d 311 (D.C. Cir. 1972); *RadiOhio, Inc.*, 38 FCC 2d 721 (1973), *aff'd sub nom. Columbus Broadcasting Coalition* v. *F.C.C.*, 505 F. 2d 320 (D.C. Cir. 1974). In the instant case, FCI has cited a substantial amount of non-entertainment programming on both stations and a substantial amount of non-entertainment programming on WVKO(AM) specifically directed at the Black audience, and has provided an explanation of its programming decisions. The petitioners do not in any way address the sufficiency of the non-entertainment programming cited by FCI, or provide any information to show that FCI's non-entertainment programming decisions were unreasonable or in bad faith other than its arguments concerning "abandonment" of "target audience." However, as indicated above, this assertion is without merit. In view of the non-entertainment programming cited by FCI, and the failure of the petitioners to provide any information to show that FCI acted unreasonably or in bad faith, the petitioners' programming allegations fail to raise a substantial and material question of fact as to whether renewal of FCI's licenses would serve the public interest.

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[1] Upon well-supported challenge, such narrowly focused station would be called upon to show that there were other stations in the area upon which it could reasonably rely to "address the issues confronting the other segments of the community." *Id* at 992.

6. The petitioners also assert that FCI "misrepresented its intentions" in its application for assignment of the stations. The petitioners state that in its assignment application FCI stated that as licensee it would "continue to treat the needs and interests of the general community making up the service area with the blend of news, public affairs, and all other programming aimed at its 'target audience,'" but soon after taking control of the station FCI made the programming changes about which the petitioners complain. In opposition, FCI states that it has fulfilled and will continue to fulfill the programming representations contained in its assignment application.

7. FCI has cited a substantial amount of general interest and Black-oriented non-entertainment programming which it has broadcast. Not only have the petitioners failed to rebut this, but they have conceded that there has been a "proliferation of non-entertainment programming" on WVKO(AM). Thus, it is obvious that petitioners have failed to establish a *prima facie* showing that FCI has failed to make a good faith effort to fulfill the programming representations contained in its assignment application. Accordingly, the petitioners' allegation of "misrepresentation" by the licensee fails to raise a substantial and material question of fact.

8. The petitioners also assert that the licensee failed to comply with the Commission's rules concerning the maintenance of a public file. The petitioners state that FCI "relied on the ascertainment list of the previous licensee," and that the previous licensee's programs/issues list "falls short of even the bare minimum requirements" established in *Deregulation of Radio, supra*. Further, the petitioners state that the programming proposal submitted in FCI's application for assignment "fails to identify any issues or methodology by which FCI proposes to ascertain said issues; nor does such programming proposal identify any programming which will be responsive to said issues."

9. These allegations are without merit. In *Deregulation of Radio, supra*, the Commission eliminated the specific ascertainment procedures which had been required of all commercial radio licensees and

applicants for new commercial radio stations. Instead, the Commission stated that:

> applicants for new radio stations . . . will be free to determine the issues in their community that warrant consideration and may do so by any reasonable means. To the extent that parties may wish to raise questions concerning those efforts, such questions should be directed to the realities of the program proposal of applicants, or the responsiveness of licensees, rather than the ritual of ascertainment. *Id.* at 993.

With regard to record keeping, the Commission stated that:

> [t]he only paperwork requirement that will attach to this obligation will be for each . . . assignment or transfer applicant . . . to file a programming proposal and for each licensee seeking renewal to annually place (on the anniversary date of the grant of authorization for a licensee's first license term and thereafter on the anniversary date on which the station's renewal application would be due for filing) in its public file a listing of five to ten issues to which the station paid particular attention with programming, together with a brief description of how the licensee determined each issue to be one facing his community and of how each issue was treated. . . . *Id.* at 998–99.

See also, Section 73.3526(a)(14) of the Commission's rules, 47 C.F.R. 73.3526(a)(14). Thus, *Deregulation of Radio, supra*, and the Commission's rules do not require the specificity as to methodology of ascertainment or identification of issues which the petitioners cite as a deficiency in the programming proposal in FCI's assignment application.[2] Further, since FCI's assignment application was granted on January 6, 1982 and its renewal application was due on June 1, 1982, it was not required to place a programs/issues list in its public file until June 1, 1983. 47 C.F.R. 73.3526(a)(14). Finally, the adequacy of the programs/issues list maintained by the previous licensee does not have any relevance to the qualifications of FCI to be a Commission licensee. In view of the above, the petitioner's allegations concerning FCI's programming proposal and public file do not raise a substantial and material question of fact.

10. Finally, the petitioners argue that FCI has violated the Commission's EEO rules.[3] The petitioners charge that a "significant number" of Blacks were either fired, forced to resign or given diminished responsibilities, while a "substantial number" of whites were hired or promoted since FCI's assumption of control. Specifically, the petitioners allege that, in conjunction with the FM station's

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[2] In this regard, we note that FCI's assignment application was granted on January 6, 1982. Therefore, even if its programming proposal had been deficient, it would not be subject to review as a result of allegations first raised on August 30, 1982, the date the petitioners filed their petition to deny.

[3] Section 73.2080 of the Commission's rules enjoins broadcast licensees from discriminating against any person in matters of employment on the grounds of race, sex, color, religion or national origin. In addition, the rule requires licensees to establish and maintain a program which, among other things, results in the communication of the station's employment needs to sources of qualified applicants without regard to race or sex.

change of format, FCI fired three Black announcers, forced the resignation of another and fired a Black engineer, but fired no white employees. In addition, they contend that although three Blacks were retained in management positions, their job functions and responsibilities have been reduced. Similarly, the petitioners charge that FCI failed to give minority employees the opportunity to apply for jobs which could lead to positions in management. Finally, although the petitioners concede that FCI has hired four Blacks, they claim that it has also hired 14 whites; that all of the whites but only one Black were hired for the FM station; and that the staffing for the two stations is now separate, and not merged as reported in the stations' 1982 Annual Employment Report. In opposition, FCI observes that as of September 1982, four months after it took control of the stations, it employed 29 persons full-time, including ten Blacks, and that eight of those ten were employed in the upper-four job categories. Further, the licensee notes that during that period it hired six Blacks, including three professionals and one salesman, and that it retained seven Blacks (three employed part-time) who had been employees of the former licensee. Responding to the petitioners' charges concerning the firing of Black announcers, FCI acknowleges that two Blacks resigned while three others were terminated. However, it states that race was not a basis for any of the terminations, and it explains the circumstances surrounding each employment decision. Similarly, with regard to the termination of a Black part-time engineer, the licensee notes that it also terminated three white part-time engineers as a consequence of its decision to cease use of part-time engineering personnel. Finally, FCI states that another Black, the stations' former music director, was reassigned to part-time work because of an overlap of duties with the AM station's program director. However, with regard to two other Black managers, the licensee states that no diminution of responsibilities has occured, and it notes that a Black has advanced from receptionist to traffic director during its tenure.

11. Comparison of the licensee's employment of minorities with the labor force percentage of minorities in the Columbus SMSA (10.5%) reveals that FCI's percentage of minority employment is substantially in excess of labor force parity. Thus, the stations' profile does not raise any questions about the licensee's employment practices with respect to minorities. Likewise, the licensee's placement of its minority employees and its hiring record during the four months immediately following its assumption of control at the stations indicate compliance with our EEO requirements. Further, the licensee's unrebutted explanations[4] regarding its personnel actions at the stations satisfy us that no proscribed discrimination

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[4] Petitioners' reply contains no response to FCI's statements regarding its EEO performance.

has occured. Finally, the petitioners' suggestion that Blacks are being excluded from FCI's FM station is unsupported and speculative, and raises no question warranting further inquiry. In sum, we are firmly convinced that Franklin has complied with our EEO requirements with respect to minorities and that no substantial and material question of fact exists with regard to Franklin's EEO record.[5]

12. Accordingly, IT IS ORDERED, That the petition to deny the license renewal applications of Franklin Communications, Inc., for Stations WVKO(AM) and WSNY-FM, Columbus, Ohio, filed August 30, 1982, IS DENIED.

13. IT IS FURTHER ORDERED, That the license renewal applications filed by Franklin Communications, Inc., for Stations WVKO(AM) and WSNY-FM, Columbus, Ohio, ARE GRANTED.

14. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, shall send, by Certified Mail - Return Receipt Requested, a copy of this Memorandum Opinion and Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[5] With regard to the licensee's reporting of the stations' staff, we note that FCI's initial Annual Employment Report for the stations was not due until May 31, 1983 and that Franklin had the option of filing separate reports or a combined report for the stations. *See* Instructions for completion of FCC Form 395, para. 5.

Anti-competitive Practices, Rates
Candor
Misrepresentation, Character Qualifications
Political Broadcast, Rates, Lowest Unit Charge

Review Board affirms ALJ's renewal grants of two licensees. In so doing, it finds that licensees did not engage in anti-competitive conduct by combining or conspiring to arrange commercial advertising rates and that their principals neither misrepresented nor lacked candor in their statements or testimony. The Board also finds that one licensee violated Section 315(b) concerning political advertising rates but concludes that no sanction is appropriate.
–Gilmore B/cing Corporation
BC Docket No. 78–81

FCC 83R–72

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
GILMORE BROADCASTING CORPORATION	BC Docket No. 78–81 File No. BRCT-175
For Renewal of License of KODE-TV Joplin, Missouri	
MID-CONTINENT TELECASTING, INC.	BC Docket No. 78–82 File No. BRCT-232
For Renewal of License of KOAM-TV Pittsburg, Kansas	

Appearances

R. Russell Eagan, *John C. Quale*, *John B. Wyss*, and *James R. Bayes*, on behalf of Gilmore Broadcasting Corporation; *Martin R. Leader* and *Kathryn R. Schmeltzer*, on behalf of Mid-Continent Telecasting, Inc.; and *Charles D. Dziedzic*, *Robert A. Zauner*, and *Lawrence Bernstein*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

DECISION

(Adopted: September 15, 1983; Released: September 30, 1983.)

BOARD MEMBER JACOBS FOR THE REVIEW BOARD: BOARD MEMBER BLUMENTHAL CONCURRING WITH STATEMENT.

1. There are three stations in the Joplin, Missouri-Pittsburg, Kansas television market: KODE-TV and KTVJ(TV), Joplin and KOAM-TV, Pittsburg. Three months before their regular renewal date of February 1, 1977, the Commission received a complaint letter (Bur. Exh. 21) alleging that the stations had engaged in price fixing of their commercial advertising rates during mid-1976. These allegations spawned a two-year grand jury investigation by the Antitrust Division of the U.S. Department of Justice, which was terminated in June 1979 without any indictments, and an FCC investigation, principally in October and November 1976, which resulted in designating all three renewal applications for evidentiary hearing by Memorandum Opinion and Order, FCC 78–160, released March 14, 1978, 43 Fed. Reg. 11752 (1978). We now have before us the ultimate results of the Commission proceeding.

2. As modified by Order, FCC 78M-1327, released September 11, 1978, the hearing issues herein originally concerned whether the three stations had engaged in anticompetitive practices by combining or conspiring to arrange their commercial advertising rates; whether their activities actually resulted in price fixing; whether the licensees or their management officials misrepresented facts to the Commission during its investigation or were lacking in candor; whether Station KODE-TV violated Section 315(b) of the Communications Act of 1934, as amended, by charging political candidates higher rates in 1976 than were being charged to commercial advertisers; whether the broadcast record of Gilmore Broadcasting Corporation, licensee of Station KODE-TV, has been meritorious; and whether the licensees of the three stations have the requisite qualifications to be or remain Commission licensees. However, on October 9, 1980, a Summary Decision was released by presiding Adminstrative Law Judge John H. Conlin (ALJ), FCC 80D-33, which resolved all of the issues pending against KTVJ(TV) in its favor and granted KTVJ(TV)'s renewal application. That decision became effective on November 28, 1980. Thus, the proceeding presently focuses only on the renewal applications of KODE-TV and KOAM-TV.

3. In his Initial Decision (I.D.), FCC 83D-16, released March 7, 1983, the ALJ resolved the price fixing, misrepresentation, and candor issues in favor of KODE-TV and KOAM-TV and granted their renewal applications. In so doing, he did not deem it necessary

to reach an ultimate conclusion on KODE-TV's meritorious programming issue and concluded that KODE-TV had violated Section 315(b) of the Communications Act but that the violation was "unintentional," "uncharacteristic" of KODE-TV's operations, and did not warrant a sanction. I.D., Conclusions, para. 3.

4. Exceptions to the I.D. have been filed by the Mass Media Bureau; Gilmore Broadcasting Corporation, licensee of KODE-TV, and Mid-Continent Telecasting, Inc., licensee of KOAM-TV, filed briefs supporting the I.D. Reply briefs were filed by all three parties. The Review Board has reviewed the I.D. in light of the exceptions and briefs, the oral argument held June 23, 1983, and our examination of the record. We adopt the findings of fact in the I.D., except as modified herein, and affirm the ALJ's ultimate conclusion that grant of Gilmore's and Mid-Continent's renewal applications would serve the public interest, convenience, and necessity.

5. *Background and Key Station Personnel.* The license renewal period under scrutiny in this proceeding is February 1, 1974 through January 31, 1977. *James S. Gilmore*, Jr., Gilmore's 90% owner, was president of Gilmore from 1968 through September 1981 and became chairman of Gilmore's board of directors on October 1, 1981. *Hamilton Shea*, a Gilmore director, was Executive Vice President from August 16, 1968 through September 30, 1975 and retired from all corporate offices on December 31, 1978. Having served as operations vice president since October 1974, *Richard Reed* succeeded Shea as Executive Vice President on October 1, 1975 and served until March 1, 1977, when he was fired. *Robert E. Lee* became station manager of KODE-TV in 1971 and continued until January 1, 1975, when he became general manager, a position he held until April 12, 1976, when he was fired. *John S. Markward* joined Gilmore on April 6, 1976 and became KODE-TV's general manager, a position he still holds, on April 13, 1976. *John R. Holmes* served as KODE-TV's general sales manager from October 1970 through August 18, 1976, when he was fired. On October 1, 1976, Holmes filed the complaint letter which led to this proceeding (see paragraph 1, *supra*). The general manager of each Gilmore station (there are six radio and television stations in all) reports to the Executive Vice President, who, in turn reports directly to James S. Gilmore, Jr. I.D., Findings, paras. 5, 6, 11, 13, 15, 21, 22.

6. As to Mid-Continent personnel who were prominently involved in this proceeding, *H. Lang Rogers*, is a vice president, director, and 16% stockholder, and *Billy M. Bengtson* is a vice president and general manager of KOAM-TV, a position he has held since 1971. As general manager, Bengtson reports directly to the board of directors. Mid-Continent does not own any other stations but is the dominant station in the Joplin-Pittsburg television market. I.D., Findings, paras. 6, 10.

7. *Alleged Price Fixing at KODE-TV and KOAM-TV.* At the

hearing, the Bureau marshalled testimonial and documentary evidence in an effort to elicit the following conclusions on the price fixing issues: that as early as 1970 when John Holmes first came to work for KODE-TV as general sales manager, and through June 1976, Gilmore executives instructed top KODE-TV management officials to meet with KOAM-TV management and effect a general increase in commercial advertising rates at both stations; that an agreement to set prices was reached by KODE-TV and KOAM-TV sometime between April and July 1976; and that various Gilmore witnesses and KOAM-TV's general manager, Billy M. Bengtson, subsequently misrepresentated facts to the Commission during its 1976 investigation and at the 1981 hearing, concerning their involvement in the scheme to raise rates. Bur. Exceptions, at 2–3. In the I.D., the ALJ divided his analysis of the evidence into six parts: (1) 1970–1974, when Hamilton Shea was Gilmore's Executive Vice President; (2) Richard Reed's April 1975 staff memoranda to Shea, Holmes, and Robert E. Lee, while Reed was Gilmore's operations vice president; (3) an April 15, 1976 dinner meeting among Reed, John Markward, and William Acker (KODE-TV's later operations director) at the Hidden Acres Restaurant; (4) an April 20, 1976 lunch between Markward and Billy Bengtson at The Rafters; (5) a June 28, 1976 KODE-TV sales meeting that was secretly taped by Holmes (Bur. Exh. 7 and 7A); and (6) Bengtson's and Markward's interviews with FCC investigators in October 1976 (Bur. Exh. 8 and 10). The ALJ essentially rejected the Bureau's proposed conclusions because of lack of sufficient evidence, *e.g.*, I.D., Findings, paras. 14, 20, 43–47, or the resolution of conflicts in testimony in the applicants' favor, *e.g.*, I.D., Findings, paras. 14, 44, 46.

8. The Bureau takes very strong exception to the exoneration of KODE-TV and KOAM-TV on the price fixing issues, asserting that the I.D. "ignored or misinterpreted massive amounts of substantial and unrebutted evidence" (Bur. Exceptions, at 2, 3) and had to "disbelieve, discount, and outright ignore the testimony of not less than *five* Bureau witnesses" (*id.*, at 6; emphasis in original) in order to do so. Our review of the evidence and of the ALJ's careful analysis shows these verbal missiles to be fatally misguided.

9. At the outset, it is important to emphasize the inherent difficulties in proving the existence of a conspiracy to engage in anticompetitive practices (or any other type of conspiracy). A conspiracy, by its nature, involves secrecy and rarely can one get a glimpse or make proof of the secret conferences which inaugurate it. *Rizzo* v. *United States*, 304 F. 2d 810 (8th Cir. 1962). Hence, "a conspiracy may and usually has to be established by circumstantial evidence." *Id.*, at 825. Nevertheless, to establish a conspiracy, there must be "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement . . . ." *American Motor Inns, Inc.* v. *Holiday Inns, Inc.*, 521 F.2d 1230, 1243 (3d Cir.

1975). A mere showing of close relations or frequent meetings will not permit the inference of an illegal agreement. *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980), *cert. denied*, 454 U.S. 1083 (1981); *Hunt* v. *Mobil Oil Corp.*, 465 F. Supp. 195, 231 (S.D. N.Y. 1978), *aff'd mem.*, 610 F.2d 806 (2d Cir. 1979) (the mere fact that parties met together and discussed common business concerns cannot support an inference of an antitrust conspiracy); *Hanson* v. *Shell Oil Co.*, 541 F.2d 1352, 1359–60 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977), (evidence that competitors met together at trade association meetings and at a separate private meeting is insufficient to show illegal conspiracy or arrangement necessary for antitrust violation).

10. The evidentiary difficulties in the instant case have been compounded by numerous apparent or real conflicts in witness testimony. See paragraph 7, *supra*. In the I.D., the ALJ resolved these conflicts through copious use of credibility findings, repeatedly invoking such factors as lack of corroboration (I.D., Findings, para. 14), flat denials (*id.*), motive to dissemble (*id.*, at note 4), absence of inherent incredibility (*id.*, at para. 51), weight of the evidence (*id.*, at para. 53), immaterial discrepancies (*id.*, at para. 55), and passage of time (*id.*) to sift through the testimony and analyze it. In this process the ALJ declined to conclude that any witness had lied (see paragraph 20, *infra*), but he clearly rejected the testimony of certain witnesses, at least in part: *e.g.*, Reed (*id.*, at para. 53); Holmes (*id.*, at para. 14); and Denny Ballard and Fred Hutching (two Bureau witnesses, both KODE-TV salesmen during 1975–76, whose brief testimony is not referenced in the I.D.). We do not propose to dissect the ALJ's credibility evaluations, despite the Bureau's numerous exceptions, except to the extent that the testimony in question is decisionally significant. See Section 1.282(b)(2) of the Commission's Rules, 47 CFR 1.282(b)(2). Even then the ALJ's evaluations are, of course, entitled to special deference since they come from the trier of fact who saw and heard the witnesses testify. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951); *Gateway Broadcasting Enterprises, Inc.*, 58 FCC 2d 63, 66, 36 RR 2d 471, 474 (1976); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 840, 50 RR 2d 1117, 1126 (Rev. Bd. 1981).

11. We quickly pass over the first two parts of the ALJ's conspiracy analysis (see paragraph 7, *supra*). While we understand the Bureau's attempt to show that prior to April 1976 an established course of conduct existed among top Gilmore executives to instruct or advise KODE-TV management to meet with KOAM-TV management and engage in price fixing, we agre with the ALJ that the proffered evidence is "insufficient" as to the 1970–74 period (I.D., Findings, para. 14) and, as to Reed's two April 1975 memoranda, which favored a "highly questionable course of action" (*Id.*, at para. 20), the record is indeed "clear" that none of the recipients took steps

to implement Reed's price fixing suggestions. *Id.* Under these circumstances, the Bureau's showing is not material to the designated price fixing issues (see paragraph 2, *supra*) because no contacts between KODE-TV and KOAM-TV management are even alleged[1] and because the Bureau has not successfully implicated Hamilton Shea, Gilmore's Executive Vice President from 1968 through September 30, 1975, in the alleged course of conduct.

12. Turning to the third episode—the April 15, 1976 Reed-Markward-Acker dinner—it ended, according to Acker (Tr. 1091), with Reed telling Markward: "You've got to get with these guys and get . . . the spot rates up in this market." Reed flatly denied having made any suggestion to Markward that he should get together with the other general managers in the market to raise spot rates (Tr. 2266), and Markward did not recall any such suggestion (Tr. 1900). Moreover, six years later, while Acker "testified straightforwardly and unequivocally concerning Reed's instructions, insisting that he still recalled them word-for-word" (Bur. Exceptions, at 16), Acker also confirmed that Markward gave no indication during or after the dinner that he understood Reed to have made such a suggestion (Tr. 1120–22), and he (Acker) knew of no price fixing that had actually occurred (Tr. 1100).

13. The ALJ reconciled this conflicting testimony in Reed's and Markward's favor (I.D., Findings, para. 53), concluding, by implication, that any remarks Reed may have made during the dinner were not understood by Markward as a suggestion or direction to engage in price fixing. Markward did testify that at other times Reed had instructed him to quickly introduce himself to local business and community leaders (*id.*, at para. 22) but denied that he ever instructed him to seek a price fixing arrangement with other stations (Tr. 1983–85, 2030–31). While the Bureau stoutly maintains that Reed's denials and Markward's claimed lack of recall are "unbelievable, self-serving and outright fabrications" (Bur. Exceptions, at 19) in the face of Acker's "unbiased" testimony, which amounted to "speaking against his present employer and contrary to his own self-interest" (*id.*, at 18, 19 n. 1), the ALJ's view is supported by substantial evidence and will not be disturbed. *Cf. Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 853 (D.C. 1970), and cases cited in paragraph 10, *supra*. In reaching this conclusion, we are especially skeptical of Acker's alleged word-for word recall of Reed's words six years later and note the ALJ's finding that Acker and Lee were close

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[1] In its June 4, 1982 proposed findings of fact and conclusions of law, at 48, the Bureau itself asserts that the earliest possible date for the alleged price fixing conspiracy was "April 1976." For this reason, the ALJ quite properly ignored Reed's brief encounter with KOAM-TV general manager Billy Bengtson over cocktails on February 17, 1976 in Washington, D.C. See also Tr. 1664, in which Bureau counsel expressly stated: "There's no suggestion that anybody [from KODE-TV] met with KOAM management at any time before April of 1976."

friends and that Acker was upset about Lee's firing and his replacement by Markward three days before the dinner. I.D., at n. 5.

14. The fourth significant time period, and perhaps the most important one in the ALJ's eyes, was Markward's get-acquainted lunch with KOAM-TV general manager Bengtson on April 20, 1976 (and a few subsequent telephone conversations during the next several months).[2] According to the ALJ, these were the only relevant contacts between Markward and Bengtson, in terms of an alleged price fixing conspiracy. I.D., Findings, para. 44. And he concluded that these contacts did not constitute evidence of any combination or conspiracy because both Markward and Bengtson deny that they ever agreed, or attempted to reach an agreement, to fix prices, and "[n]o persuasive evidence was presented which contradicted their testimony." *Id.* The ALJ conceded that the two men discussed Joplin market advertising rates but found nothing in their testimony or in their October 1976 FCC statements from which it could be reasonably inferred that a price fixing agreement had been struck. Moreover, there was no evidence in the record of any changes in advertising rates or selling practices from which the existence of an improper combination or conspiracy could be inferred. *Id.*, at para. 45.

15. In its exceptions to these conclusions, the Bureau argues that the I.D. ignored "significant" differences in the two participants' testimony concerning what was said at the luncheon and sets out some of these differences based on Bur. Exh. 10 (Bengtson's *1976* FCC statement) and Markward's *1981* hearing testimony (Tr. 2086–93). Bur. Exceptions, at 22–23. While the Bureau maintains that the I.D. failed to discuss these differences at all, we disagree. Concerning these matters, the ALJ specifically held: "The substance of their testimony has been accepted, and while their accounts differ in some particulars, this is not unnatural, especially in view of the time that has elapsed since the events occurred." I.D., Findings, para. 55. In other words, it was the ALJ's conclusion, which we affirm, that the allegedly significant testimonial differences were not significant, at least in terms of attempting to prove that a price fixing conspiracy materialized at the luncheon. Indeed, even the Bureau had some reservations about the significance of these conversations, since its Proposed Findings, *supra*, at 48, argue only that a price fixing arrangement was made by Markward and Bengtson "*possibly* as early as April 1976" (emphasis added).

16. The Bureau further observes (correctly) that, in treating the luncheon evidence, the ALJ made no mention of John Holmes' testimony (Tr. 338, 360) that in April 1976 Markward told him that

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[2] Under this rubric we shall also consider the sixth segment of the ALJ's analysis—Markward's and Bengtson's interviews with FCC investigators in October 1976—because the resulting written "statements" (Bur. Exh. 8 and 10) significantly discuss this luncheon meeting.

getting together with other managers "to get those rates up there" was his "main priority" and that "he had met with Mr. Bengston of KOAM, and that they, KOAM, had agreed to raise the rates in the market." We have already noted (paragraph 10, *supra*) that the ALJ did not credit all of Holmes' testimony. Holmes is aptly described by Gilmore as a "disgruntled" former employee, Gilmore Br., at 12, and the testimony by Hutching (Tr. 1063) that Holmes told him he would make Gilmore "regret" his termination and by Acker (Tr. 1140) that Holmes said he was going to "bury" Gilmore provide ample grounds for treating the comments of the Bureau's principal witness especially circumspectly. We believe that the ALJ properly gave Holmes' hearsay evidence concerning the luncheon no weight.

17. Finally, we address the June 28, 1976 KODE-TV sales meeting that was surreptitiously taped by Holmes. Gilmore and Mid-Continent go to great lengths in their briefs to challenge the authenticity of the tape and the reliability of the resulting transcripts (Bur. Exh. 7 and 7A). These exceptions will be denied. We hold that the tape was adequately sponsored by its preparer (Holmes) with the aid of voice identification, and that Gilmore and Mid-Continent waived any valid objection to the reliability of the corrected Bureau transcript (Bur. Exh. 7A) by refraining from preparing their own transcription of the tape and specifically challenging either the contents of the Bureau's version or the process whereby it was prepared. *See* Fed. Rules of Evid. 901.

18. The significance of the June 28 meeting is that, according to the Exh. 7A transcript, it contained an oral report by Markward to his sales staff concerning a telephone conversation he allegedly had with Bengtson the day before. In the transcript Markward says (illustrative excerpts):

> "I talked to Bengtson yesterday . . . . Katz [KOAM-TV's national sales representative] is trying to get him to raise the ante too; I think he's going to go up . . . So he mostly wanted to know . . . would I go along with him. I said yeah, within reason I will . . . he said he's going to call me back this week and telling me what the finals are going to be . . . we'll see what happens . . . I think he's finally seen the light. Mostly at the urging of Katz . . . ."

The Bureau asserts that it was decisive error for the I.D. to conclude that Markward's statements at the sales meeting did not establish that an agreement to raise rates was reached between Bengtson and Markward. Exceptions, at 23–24. It also faults the I.D. for relying on allegedly out-of-context statements by Markward (such as "I think he's going to go up") as indicative of uncertainty and lack of agreement with Bengtson, and labels Markward's explanation that his remarks were only an exaggerated pep talk as "simply unbelievable." *Id.*, at 25. Curiously, the Bureau's exceptions do *not* attack Bengtson's testimony to the effect that he had no recollection of ever discussing rates with Markward except at the April luncheon (Tr. 2458–60) or his categorical denial that he ever indicated to Markward that he would raise KOAM-TV's rates if KODE-TV would go along with a similar rate increase (Tr. 2383–84). Bengtson also denied being told by the Katz Agency that he was selling too low and should raise KOAM-TV's rates (Tr. 2456–58). For his part, Markward insisted in his hearing testimony that his June 28 remarks included his own predictions and speculation as to what KOAM-TV might do, and went beyond what had been in his telephone conversation with Bengtson. Tr. 2105–11. According to Markward, in his actual conversation with Bengtson there was no mention of specific rates, and Bengtson had in fact indicated that he had not reached any final decision on future pricing. Tr. 2106, 2110–11. Moreover, Bengtson never called Markward back with the "finals" (new rate card information). Tr. 2111.

19. We affirm the ALJ conclusion that the proffered evidence does not establish that Markward and Bengtson entered into a price fixing conspiracy on or about the time of the June 28, 1976 KODE-TV sales meeting. Markward's "pep catalyst" (Tr. 2108) explanation for the discrepancies between his meeting report and the true tenor of his conversation with Bengtson is plausible, not "inherently improbable and irreconcilable . . . with common observation, and experience," as the Bureau would have it, citing *The Prattville Broadcasting Co.*, 5 FCC 2d 601, 602 (Rev. Bd. 1966). Puffery is a recognized sales technique which may be practiced *upon* salesmen as well as *by* them. While we agree with the ALJ that some of the language in Exh. 7A may suggest "some sort of collusion," I.D., Findings, para. 46, the record as a whole on this matter does not establish the existence of a conspiracy to raise advertising rates. This conclusion is bolstered by the Bureau's own admission (Exceptions, at 27) that "there is no statistical evidence that prices did or did not rise at any particular point," pursuant to the alleged conspiracy, and by the ALJ's unchallenged findings which fully rebut the numerous allegations in the Bureau's Bill of Particulars that KODE-TV and KOAM-TV changed various advertising rates and practices after April 1976 pursuant to a conspiracy. I.D., Findings, paras. 33–42. Likewise, the absence of evidence of conspiratorial fruits does not support the inference of the existence of a conspiracy. Indeed, KOAM-TV's advertising rates tended to be lower after April 1976 than before! *Id.*, at 45. In sum, having surveyed all of the direct and circumstantial evidence that was presented on the two price fixing issues, and giving due deference to the ALJ's credibility findings (see paragraph 10, *supra*), we affirm the ALJ's ultimate conclusion that Gilmore and Mid-Continent did not engage in anticompetitive conduct by combining or conspiring to arrange commercial advertising rates.[3]

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[3] Gilmore argues (Exceptions, at 19) that the termination of the Justice Department's grand jury investigation of KODE-TV and KOAM-TV in June 1979 without

20. *Misrepresentation/Lack of Candor Issue.* In the I.D., the ALJ specifically considered whether James Gilmore, Hamilton Shea, Richard Reed, John Markward, and Billy Bengtson made misrepresentations or lacked candor in their pre-hearing statements to FCC investigators or in their hearing testimony. As previously noted in paragraph 10, *supra*, he did not conclude that any of them lied, misrepresented, or lacked candor in their statements or testimony. I.D., Findings, paras. 49–55. However, the ALJ did reject Reed's denials that he had urged Shea, Lee, and Holmes to seek an agreement with KOAM-TV to raise advertising rates, *id.*, at para. 53, and he noted, at para. 54 n. 11, that Markward's failure to reveal in his employment history that he was fired from a radio job in 1976 after three months, while not decisionally significant, "reflects little credit" on Markward. The Bureau excepts to the exonerations and argues that each alleged misrepresentation or lack of candor would justify license denial, citing *RKO General, Inc.*, 670 F.2d 215 (D.C. Cir. 1981), because they were intentional, material, and made by key principals of Gilmore or Mid-Continent. These exceptions are essentially repetitious of the Bureau's earlier challenges to the ALJ's various credibility findings and to his weighing of conflicting record evidence under the price fixing issues, which we addressed in paragraphs 7–19, *supra*. Hence, they will be summarily denied.[4]

21. *Section 315(b) Political Advertising Rates Issue.* It is undisputed that KODE-TV overcharged a number of political candidates for advertising in the Spring and Fall of 1976, but it is also undisputed that the violations were discovered by KODE-TV employ-

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any indictments (see paragraph 1, *supra*) "required" resolution of the two price fixing issues in its favor. We disagree. While the Commission does not adjudicate violations of the antitrust laws *per se*, it is well-established that it may consider whether anticompetitive conduct has occurred as part of its public interest determination of licensee qualifications. See *NBC* v. *U.S.*, 319 U.S. 190, 222–24 (1943); *Uniform Policy on Violation of Laws*, 42 FCC 2d 399, 401 (1951). Thus, the fact that a grand jury conducted a separate investigation under federal antitrust laws does not bind the Commission to accept its outcome or preclude the Commission from conducting its own assessment under the Communications Act, if conditions warrant. Although the instant case was designated for hearing before the related grand jury investigation had ended, the Commission was aware of the existence of that investigation, *see Taft Broadcasting Corp.*, 76 FCC 2d 45, 50, 46 RR 2d 1427, 1431 (1980), and nevertheless determined to proceed with its own evidentiary inquiry. *Id.* We cannot gainsay that judgment here (*see* Memorandum Opinion and Order, FCC 80M-572, released April 8, 1980, at para. 5, in which the ALJ denied Gilmore's and Mid-Continent's motions to delete the price fixing issues), and the grand jury deliberations, being secret, are of no evidentiary assistance to us.

[4] The Bureau's attempt to magnify the importance of Markward's failure to recall his unsuccessful effort to set up an introductory luncheon meeting with KOAM-TV vice president Lang Rogers is denied as lacking decisional significance. Such a perfunctory telephone contact, occurring six years earlier when Markward was trying to set up numerous introductory lunches with Joplin community leaders, cannot support a finding of misrepresentation or lack of candor. *See Scott & Davis Enterprises, Inc.*, 88 FCC 2d 1090, 1100, 50 RR 2d 1251, 1258–59 (Rev. Bd. 1982).

ees and the candidates were reimbursed prior to the Commission's investigation into the matter. I.D., Findings, paras. 56, 67. The ALJ concluded that none of the violations was intentional and criticized, but did not sanction, Gilmore for not discovering its error sooner. The Bureau excepts, asserting that Markward's "cavalier disregard" for Section 315(b) is further reason for denying Gilmore's renewal application. We do not share the Bureau's view of Markward's conduct in this matter. Although we agree with the ALJ that Markward ought to have more diligently pursued the question whether any advertisers had been paying lower "off-card" advertising rates during the relevant pre-election period (which some advertisers *had* done), the record indicates that Markward relied on a March 1, 1976 memorandum from John Holmes, who was then still KODE-TV's general sales manager, to the effect that all "off-card" sales had ceased. I.D., Findings, para. 60. And when a new rate card was issued on April 26, 1976, Markward instructed the sales staff to continue what he believed to be established company policy (no further "off-card" sales). *Id.* It was Holmes' responsibility as sales manager to clarify the situation, but he didn't. Indeed, the ALJ found that no "specific instance" of overcharging was brought to Markward's attention (although *Holmes* was clearly aware that it was happening). *Id.*, at para. 63. Moreover, there is some indication that Holmes intentionally refrained from keeping Markward fully apprised. *Id.*, at para. 62; see also paragraph 16, *supra*. Under these circumstances, and given the other mitigating factors described above, we affirm the ALJ's conclusion that no sanction against Gilmore is appropriate. *Cf. Gross Telecasting, Inc.*, 92 FCC 2d 204, 241, 52 RR 2d 851, 876 (renewal applicant's overall qualifications not impaired by limited labor law violation). In so doing we reiterate the ALJ's admonition to Gilmore (and all Commission licensees) that any violation of Section 315(b), inadvertent or not, is of serious concern to the Commission and that strict compliance with that statutory provision and related requirements of Section 315 is one of a licensee's highest obligations. *E.g., Pacific Media Corp.*, 51 RR 2d 1304 (1982).

22. *Ultimate Conclusions*. As if anticipating that the Board would affirm the ALJ's price fixing conclusions, the Bureau argues at the end of its brief that even if no "improper contacts" between KODE-TV and KOAM-TV occurred, the Board must consider the impact on Gilmore's basic qualifications of evidence allegedly establishing that Gilmore's executives *attempted* to bring about a conspiracy by directing KODE-TV's management to enter into improper contacts with KOAM-TV. According to the Bureau, the Commission may have nipped the price fixing conspiracy in the bud by commencing its investigation in October 1976, and Gilmore and

Mid-Continent do not merit license renewals because of the fortuitous event that the conspiracy they sought was not consummated.[5]

23. While we affirm herein the ALJ's ultimate conclusion that Gilmore and Mid-Continent have the requisite qualifications to remain Commission licensees and should be awarded full-term license renewals, more must be said about the borderline anticompetitive communications of Gilmore's Richard Reed and John Markward in this case. It is impossible under existing case precedent (see paragraph 9, *supra)* to demarcate the precise point at which general, permissible discussions about market conditions, rates, etc. among competitors end and illicit price fixing conspiracies begin, particularly when we are interpreting FCC anticompetitive conduct policy, as distinguished from federal antitrust law (see footnote 3, *supra*). However, we are confident that no conspiracy was effected in the instant case. Nevertheless, we caution all licensees against straying as close to the anticompetitive border as Gilmore's management came, and we admonish Gilmore for having gotten so close. But we see no basis, on this record, for doing more. First, in the ALJ's and our own analysis of the evidence, only two Gilmore employees (Reed and Markward) were involved in any pre-conspiracy types of communications (see paragraphs 11–19, *supra*). Second, Markward is not and never has been a Gilmore owner or corporate executive (although he has held the key staff management post of KODE-TV general manager for the last seven years), and Reed, a Gilmore executive from 1974 through his firing on March 1, 1977, left the Gilmore scene more than six years ago. *Cf. Gross Telecasting, Inc.*, *supra*. Third, James S. Gilmore, Gilmore's board chairman and 90% owner, was never even accused of any conspiracy-related conduct in this proceeding.[6] Thus, we can readily distinguish Gilmore's slightly tarnished ownership-management team from the much more severely tainted management group that earned a substantial comparative demerit—but not disqualification—in *United Broadcasting Co., Inc.*, FCC 83R-55, released August 24, 1983, at para. 17. Under these circumstances, as troubling as a possible attempt to conspire may be (and that is the most that the Bureau's evidence shows), it is not actionable here.[7]

24. ACCORDINGLY, IT IS ORDERED, That the motions to

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[5] On its face this assertion is somewhat paradoxical because the Bureau elsewhere urges that Gilmore's and Mid-Continent's conspiratorial agreement was actually reached by mid-August 1976—more than two months before the Bureau's investigation even began. Bur. Proposed Findings, *supra* note 1, at 48.

[6] This fact alone substantially punctures the illusion of a Gilmore executive conspiracy-oriented cabal that the Bureau has attempted to promote, as does the short tenure and long absence of executive Reed from Gilmore.

[7] For this reason, we need not rule on Gilmore's exception to the ALJ's refusal to reach an ultimate conclusion on its meritorious programming issue. As the ALJ indicated, I.D., Findings, para. 78, such a conclusion would only be pertinent if Gilmore were in danger of being disqualified, which it is not.

correct transcript of oral argument filed July 12, 1983 (and supplemented on July 15, 1983) and July 19, 1983 by Mid-Continent Telecasting, Inc. and Gilmore Broadcasting Corporation, respectively, ARE GRANTED.

25. IT IS FURTHER ORDERED, That the applications of Gilmore Broadcasting Corporation for renewal of its license for Station KODE-TV, Joplin, Missouri (File No. BRCT-195) and of Mid-Continent Telecasting, Inc. for renewal of its license for Station KOAM-TV, Pittsburg, Kansas (File No. BRCT-232) ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

Concurring Statement of Board Member Norman B. Blumenthal

I concur in the net result in this case; but do not necessarily join in full in the evidentiary analysis set forth in paras. 8–20 *ante*. Because my view of the case differs somewhat from that of my colleagues, a duty arises, I believe, to enunciate my perceptions, starting with an overview of the record.

Based upon reliable information from a former licensee employee, the Commission initiated its own proceeding to determine whether the subject licensees fixed broadcast advertising rates in the relevant television market, or—short of that—conspired to do so.[1]

Apart from some incriminating internal Gilmore memoranda[2] and a tape recording[3] indicating that certain KODE-TV officials were desirous of raising advertising rates in concert with their arch-competitor, KOAM-TV (Continental), this voluminous record is, quite simply, lacking in palpable evidence that (a) any advertising rates were raised, or (b) any conspiracy to raise rates was joined. If anything, the record evidence inspires the conclusion that no overt action, conspiratorial or otherwise, was ever taken by the licensees.

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[1] For better or worse, the Commission elected to commence this inquiry despite a contemporaneous investigation by the Antitrust Division of the Department of Justice and, thereafter, by a federal grand jury based on the identical allegations. *See I.D.*, para. 4. Nonetheless, our Media Bureau pursued this matter as if it were a conventional renewal case—with the procedural burden of proof on the licensees. This placement of the burden under the unique circumstances here is highly questionable. *Compare* 47 U.S.C. §309(e) (burden on renewal issues on licensee "except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission") *with* 47 U.S.C. §312(d) (burden to prove various criminal conduct "shall be on the Commission"). In reviewing the record, this separate statement purposely assesses the evidence in a light most unfavorable to the licensees. But, in the future, the Bureau would be well-advised to alter the practice used here, treat such issues "as if" the case were a revocation proceeding (or, better, actually invoke §312), and not insist that a licensee prove (by a preponderance of evidence, no less) that it *did not* engage in a what is essentially a criminal conspiracy. *See I.D.*, para. 1 (Issues 1(a), 1(b)). It is exceedingly doubtful that the courts would approve of the burden allocation utilized in this case. *Cf. Steadman* v. *SEC*, 450 U.S. 91 (1981) (agency seeking to deny extant federal privilege bears A.P.A. burden of proof, 5 U.S.C. §556(d)).

[2] *See I.D.*, para. 17

[3] *Id.*, at para. 30.

Indeed, and even regarding the evidence in its most damaging light, all that the record reveals with clarity are several precatory exchanges amongst certain Gilmore officials that appear to contemplate rather seriously the federal offense of price fixing. The resultant legal and policy question is: should such unilateral conduct—without more—be actionable by the Commission, even to the extent of denying license renewal?

After protracted reflection, I believe that the answer in this novel case is no, with certain observations. As we know, a conspiracy to violate the antitrust laws is itself a crime, even if that conspiracy never bears tangible fruit. *See* 15 U.S.C. §1 (Sherman Act) (conspiracy in restraint of trade actionable *per se*). But, as Gilmore counsel observed, when dealing with the derivative offense of conspiracy, we might pause to reflect that we are already one step removed from actual commission of the underlying crime. Moreover, the evidence in this case—again, even if viewed in its worst light—evinces, at most, a "desire to conspire," on the part of a few Gilmore officials, a circumstance now two behavioral steps removed from the generic crime. No authority has been cited to us which renders actionable conduct which is, thus, *twice removed* from active perpetration. And, neither wistful executive ruminations nor loose talk from salespersons (who elevate to life-style proportions the art of loose talk) have yet been declared punishable public offenses.

Nevertheless, and alternatively relying on the spirit of "Honi soit qui mal y pense,"[4] the Media Bureau urges that we take an isolated view of Gilmore's unwholesome internal expressions under the general rubric of "character," and that we take extreme action (nonrenewal) based directly thereon.[5] To be sure, the evidence does reflect that those Gilmore officials responsible for the incriminating statements enjoyed a callous disdain for elementary antitrust principles. However, as the general law now apparently stands, even where the imprecations of one competitor reach the level of an evident "solicitation" to raise prices, no cognizable offense has occurred without corresponding evidence that such an invitation matured into a mutual agreement. *U.S.* v. *American Airlines, Inc.*, CA-3-83-0325-D (N.D. Tex., slip opinion released September 12, 1983).[6] In this case, as in *American Airlines*, no actual conspiracy between competitors or action in furtherance thereof was demonstrated. The law's reach apparently borders at proven conspiracy, *see id.*; and—given the occasional lapses of human judgment—perhaps that is a good thing, lest every reckless utterance in contemplation of the clearly illicit raise the potential for penalization.

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[4] Motto of the Order of the Garter [1349].

[5] *See* Transcript of Oral Argument, June 23, 1983, at 2559.

[6] Indeed, in *American Airlines*, there was conclusive evidence (a tape recording) that the American Airlines' president essentially *invited* his competitor (the president of Braniff) to raise prices in concert:

Still, the attitude of the Gilmore officials spotlighted herein is thoroughly repugnant to our concept of the free commercial marketplace, and it reveals a proclivity which cannot be condoned or passed by without sharp admonition. As the Commission moves further toward reliance on the competitive marketplace to effect regulatory norms, it is imperative that such a marketplace be controlled solely by the rigorous forces of robust and unfettered competition. A marketplace rigged by fixed prices is, of course, no marketplace at all, let alone the balancing mechanism that obviates the need for pervasive governmental intervention in a particular sphere of commerce. By the evidence in this case, Gilmore has come as close to the precipice, perhaps, as any licensee dare; and it may well be—as the Mass Media Bureau hinted at oral argument[7] —that Gilmore is simply fortunate here that any incipient conspiracy or collusive implementation was thwarted by the Commission's swift investigative interest or, conversely, by the fortuitous disinterest of its competitors. If that is so, then it is hoped that Gilmore's public ordeal and its costly brush with disaster has been sufficiently salutory—not only to it, but to any licensee henceforth tempted to distort natural marketplace functions by criminal machination. The next licensee may not be so "fortunate," nor, I suspect, will Gilmore should there be the slightest repetition.

[American President]: I have a suggestion for you. Raise your **** fares twenty percent. I'll raise mine the next morning.

[Braniff President]: We can't talk about pricing.

[American President]: Oh bull ****, Howard. We can talk about any **** thing we want to talk about.

Id., slip op., at 2. In the case before us, however, the element of "overt action" to solicit Gilmore's competitors is conspicuously absent, and there is no reliable evidence to show even an "attempt to solicit."

[7] *See* Transcript, note 5, *supra*, at 2574–75; *see also* Bur. Br. at 27 ("Commission investigators [may have] prevented effectuation of the conspiracy.")

FCC 83D-16

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re Applications of

GILMORE BROADCASTING CORPORATION For Renewal of License of KODE-TV Joplin, Missouri	BC Docket No. 78-81 File No. BRCT-175
MID-CONTINENT TELECASTING, INC. For Renewal of License of KOAM-TV Pittsburg, Kansas	BC Docket No. 78-82 File No. BRCT-232

Appearances

R. Russell Eagan, *John C. Quale*, *John B. Wyss* and *James R. Bayes*, on behalf of Gilmore Broadcasting Corporation; *John P. Southmayd*, *Martin R. Leader* and *Kathryn R. Schmeltzer*, on behalf of Mid-Continent Telecasting, Inc.; *Lawrence Bernstein*, *Robert A. Zauner* and *Brian P. Kilbane*, on behalf of the Mass Media Bureau; *Henry W. Holmes, Jr.*, on behalf of John R. Holmes and Robert E. Lee; and *Karl W. Blanchard*, on behalf of William Acker.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN H. CONLIN

(Issued February 25, 1983; Released March 7, 1983)

Preliminary Statement

1. This proceeding, at this stage, involves the applications of Gilmore Broadcasting Corporation (Gilmore) and Mid-Continent Telecasting, Inc. (Mid-Continent) for renewal of the licenses to operate their respective television stations, KODE-TV, Joplin, Missouri and KOAM-TV, Pittsburg, Kansas. The renewal applications were designated for hearing by an order released March 14, 1978 (FCC 78-160, 43 Fed. Reg. 11752). The issues, as modified by an order released September 11, 1978 (FCC 78M-1327), are as follows:

> 1(a) To determine whether the licensees Gilmore Broadcasting Corporation, licensee of KODE-TV [and] Mid-Continent Telecasting, Inc., licensee of

KOAM-TV; . . . engaged in anti-competitive practices by combining or conspiring to arrange their commercial advertising rates.

1(b) To determine whether the activities, if any, described in issue (a), above, resulted in the arrangement of commercial advertising rates by the licensees Gilmore Broadcasting Corporation, licensee of KODE-TV [and] Mid-Continent Telecasting, Inc., licensee of KOAM-TV; . . .

1(c) To determine whether the licensees, Gilmore Broadcasting Corporation, licensee of KODE-TV [and] Mid-Continent Telecasting, Inc., licensee of KOAM-TV; . . . and/or its management officials misrepresented facts to the Commission and/or were lacking in candor regarding issues (a) and/or (b) above.

1(d) To determine whether the licensee of KODE-TV has violated Section 315(b) of the Comminications Act of 1934, as amended, by charging political candidates higher rates in 1976 for comparable time than were currently being charged to commercial advertisers.

1(e) To determine, in light of the evidence adduced under the preceding issues, whether the licensees of KODE-TV [and] KOAM-TV, . . . have the requisite qualifications to be or remain licensees of the Commission and whether a grant of the captioned applications would serve the public interest, convenience and necessity.

2 To determine whether the broadcast record of Gilmore Broadcasting Corporation has been meritorious, particularly with regard to its public service contributions.

2. Originally, issues 1(a)-1(e) included the third television station in the market, KTVJ(TV), licensed to Mid-America Broadcasting, Inc. On October 9, 1980 a Summary Decision was released resolving the issues in favor of KTVJ and granting its application for renewal of license. The decision became effective on November 28, 1980.

3. Prehearing conferences were held on May 23, 1978; September 7, 1978; January 9, 1979; January 2, 1980; January 16, 1981; April 7, 1981; and June 10, 1981. The first phase of the hearing was held October 20–23 and 26, 1981. At those hearing sessions, the Broadcast Bureau (now the Mass Media Bureau) submitted evidence respecting issues 1(a) through 1(d) pursuant to its burden of proceeding with the "initial presentation of evidence" (Designation Order, para. 5). The second phase of the hearing was held November 20, 24–25, 30 and December 1–2, 1981, at which time Gilmore presented its direct case. Mid-Continent presented its direct case at a hearing session held on January 15, 1982. Proposed findings of fact and conclusions of law were filed on June 4, 1982 and replies thereto were received on July 2.

4. During a portion of the time period encompassed by the occurrences described above, a related inquiry was being conducted by the Anti-trust Division of the Department of Justice. In July 1977 the Department commenced an investigation of the three television stations in the Joplin market with regard to the matters specified in issues 1(a) and 1(b). The proceedings, held before a grand jury in

Kansas City, Missouri, continued for about two years. In June of 1979, however, the stations were notified that the grand jury inquiry had been terminated and that no further action was contemplated.

Findings of Fact

5. More than 90% of Gilmore's stock is owned by James S. Gilmore, Jr., who is the chairman of the board.[1] Directors of the corporation include, in addition to James S. Gilmore, Jr., Hamilton Shea, R. Russell Eagan and John T. Mazzie, who is also Gilmore's president.[2] Harold A. Poole is the vice president/controller of the corporation and Louis Farraye is vice president/programming and research.

6. In addition to KODE-TV, Gilmore is the licensee of KODE(AM), Joplin, Missouri; WEHT(TV), Evansville, Indiana; WSVA AM-FM, Harrisonburg, Virginia; and WREX, Rockford, Illinois. The general manager of each Gilmore station reports to the executive vice president of the corporation at Gilmore's headquarters office in Kalamazoo, Michigan. The executive vice president, in turn, reports directly to James S. Gilmore, Jr.

7. Mid-Continent is the licensee of KOAM-TV.[3] Its president is Lester L. Cox, who is also a member of its board of directors. H. Lang Rogers is a vice president, director and 16% stockholder. Billy M. Bengtson is a vice president and general manager of KOAM, a position he has held since 1971. As general manager of the station, he reports directly to the board of directors.

Issues 1(a) and 1(b)—Alleged Price Fixing at KODE and KOAM

8. These issues seek to determine whether Gilmore and Mid-Continent combined or conspired to "arrange" their advertising rates and whether their "activities, if any, . . . resulted in the arrangement of commercial advertising rates . . . ." As to the latter, the Bill of Particulars alleges that after April 1976 KODE changed its advertising rates by discontinuing bonus rebate travel trips, "saturation packages," ROS spot announcements and news sponsorships; and instituted a single rate card and a policy to sell "on the card." KOAM, it is alleged, sold spot announcements at higher positions on its "grid card" and began a policy of selling "on the card." Evidence was adduced on these matters, but no finding has been proposed linking them to the alleged agreement between the

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[1] Legal title is in a trustee. James Gilmore is the beneficiary of the trust.

[2] Mazzie was executive vice president/operation from March 1, 1977 to October 1, 1981, when he was appointed president. James Gilmore, Jr. became chairman on October 1, 1981.

[3] Hereinafter, except where greater specificity is required, the two television stations that are the subject of this proceeding will be referred to simply as KODE and KOAM.

stations regarding advertising rates. Indeed the record does not show any specific instance of changes in rates or sales practices attributable to collusion between the stations. The Bureau argues, however, that for a brief period of time in 1976—as little as four weeks or as long as four months—"an arrangement existed between the management of KOAM and KODE to ensure relatively equivalent rate increases by and between the two stations" (Bureau Conclusions, p. 57).

9. A key event in the alleged conspiracy was a luncheon meeting on April 20, 1976 between KODE general manager John S. Markward and KOAM general manager Billy M. Bengtson. Both men deny that there was any discussion regarding a concerted action by the stations to increase advertising rates, and no one else was present. The Bureau contends, however, that events preceding and following the meeting as well as descriptions by the participants of what was said at the meeting point to the conclusion that an understanding was reached regarding an increase in rates in the market.

10. *Gilmore's Efforts to Increase Revenues at KODE: 1970–1974.* Of the three television facilities in the Joplin market, KOAM was regarded as the dominant station. It enjoyed a coverage advantage over the others and afforded advertisers a favorable "cost per thousand" ratio. Its closest competitor was KODE which, like KOAM, was a VHF facility. The third station, KTVJ, was a UHF facility which lagged the others in ratings and revenues. During this period the Bureau contends that in order to improve revenues at KODE, Gilmore's top management encouraged the station's general manager and sales manager to meet with their counterparts at KOAM to arrange an increase in the rates of the respective stations. The evidence on this matter consists of testimony from three witnesses: John Holmes, Hamilton Shea and Robert Lee.

11. John Holmes was KODE's general sales manager from October 1970 through August 1976. He testified that beginning shortly after he became general sales manager of KODE, Gilmore's executive vice president, Hamilton Shea, would visit the station and meet with him privately in his office. According to Holmes, during the course of their conversations, Shea told him that the big problem in the market was that KOAM's advertising rates were too low. Holmes testified that Shea directed him to attempt to arrange a meeting with KOAM management to see if he could get them to raise KOAM's rates so KODE could do the same. Holmes testified that he had such a conversation with Shea each time Shea visited the station, which was about twice a year (Tr. 309–11). He further stated that he took no action pursuant to Shea's instruction because he believed it "might be illegal." Holmes testified, however, that he discussed Shea's instruction with the station's general manager,

Robert E. Lee, on several occasions. According to Holmes, Lee told him to pay no attention to Shea's instructions and remarked that Shea had given Lee similar directions (Tr. 310–13).

12. Shea, for his part, denied categorically that he had ever, in person or by telephone, told Holmes to try to arrange a meeting with KOAM's management for the purpose of inducing a raise in KOAM's rates. According to Shea, in their conversations Holmes was the one who had brought up the subject of KOAM's low rates and complained that the station was not competing fairly in the market (Gilmore Ex. 30, pp. 6–7; Tr. 1733–34, 1788–89).

13. Robert E. Lee was KODE's station manager from 1971 through January 1, 1975 when he was given the title of general manager. During the time Lee held the title of station manager, he essentially performed the duties of general manager. As both station manager and general manager of KODE, Lee reported directly to Shea (Tr. 813–15). Lee was ultimately responsible for establishing new rate card levels and Holmes' role was to provide input to Lee in this regard (Tr. 825–26). Thus, Lee's cooperation, or at least acquiescence, would have been necessary for an improper price-fixing arrangement. Lee testified that he had no recollection of Shea ever asking him to get together with the other general managers to set rates (Tr. 834–35).[4]

14. In sum, Holmes' testimony that he was instructed by Shea to initiate an effort to reach an agreement with KOAM on advertising rates is uncorroborated and is denied by Shea. Lee, whose involvement in any price-fixing arrangement would appear to have been necessary, has no recollection of being told to seek such an arrangement. There is, therefore, insufficient evidence to warrant a finding that during this period Lee and Holmes were instructed to obtain an understanding with KOAM regarding the setting of advertising rates.

15. *Reed's April 1975 Memoranda.* Richard Reed became associated with Gilmore in October 1974 when he was appointed vice president in charge of operations. As vice president/operations, Reed gradually took over from Shea the day-to-day responsibility for managing the Gilmore stations. On October 1, 1975, he was made an executive vice president, a position he held until February 1977, when he was dismissed (Gilmore Ex. 33, pp. 1–2).

16. In late 1974 Reed began to make periodic visits to the Gilmore stations. His first trip to KODE occurred in December 1974. According to Holmes, on this visit Reed told him that the problem in the market was that KOAM's rates were too low and that he, Holmes, should get KOAM's management to raise their rates so that

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[4] It should be noted that Lee was unceremoniously fired by Gilmore in 1976 and since that time has not been employed in the broadcast industry. Thus he would seem to have no motive for being less than candid in the matter.

KODE could raise its rates (Tr. 319–21). According to Holmes, he discussed Reed's instructions with his superior Robert Lee, but could not recall the specifics of any conversations on the subject. However, Holmes did have a general recollection of Lee mentioning that Reed had asked him in a telephone conversation whether his instructions were being carried out (Tr. 321–22). Lee could not recall whether Reed ever suggested or directed that he meet with the managers of the other Joplin stations for the purpose of setting advertising rates (Tr. 851–52). Reed affirmatively denied that he ever "encouraged, whether by phone, in writing, or during a personal visit, Mr. Lee or Mr. Holmes to enter [into] any agreement or arrangement with KOAM-TV concerning advertising rates" (Gilmore Ex. 33, p. 12; Tr. 2177, 2233–34, 2303, 2306–07).

17. On April 29, 1975, Reed wrote two memos concerning the problems KODE was having with the rates charged by KOAM. The first, addressed to Shea, states:

> You mentioned you knew the people at KOAM, and as I have stated, it is very well accepted, at least in Chicago and I'm sure just the same in New York, that KOAM is utilizing a very low unrealistic rate card when it comes to their dominance in the market.
>
> If you know their management and can perhaps discuss with them the feasibility of upgrading their own rate card it will put both KOAM and KODE on a better competitive basis and at the same time, prevent a depressed market which both stations are currently experiencing. (Bureau Ex. 1.)

The second memorandum was addressed to Lee and Holmes, with a copy to Shea. It concludes with the following paragraphs:

> In talking to several time buyers as well as our H-R reps, the big problem we have other than dominance in ratings in many areas, is the fact that KOAM is not willing to raise their rate card to a realistic level. As a result, they do come in with the very low cost per thousands based on their current reach and with our rates, which are higher in many cases than KOAM, our cost per thousand is not competitive.
>
> What can be done to shore-up KOAM's rate card to prevent further depressing of the Joplin market, I am not sure, but it would appear this should be our major project through KOAM's management and, hopefully, that management's own concern in the retail market place. (Bureau Ex. 2.)

18. Both Lee and Holmes regarded the memo to them as a suggestion that they engage in "collusion" and neither man made an effort to contact KOAM (Tr. 326–28, 687, 847, 851). Shea testified that after reading both memoranda, he became concerned that there might be a "misunderstanding" as to Reed's intentions. Consequently, according to his testimony, he called Reed and told him "you just can't do that." Shea further stated that he asked Reed whether any contact had been made with KOAM's management and that Reed told him "no." Shea said that he then told Reed, "When we hang up here, you call up there and make certain that they don't." Shea

testified that he believed Reed had done as he had been instructed (Tr. 1797–1804).

19. Reed admitted writing the two April 29, 1975 memoranda. With regard to the last paragraph of his memo to Lee and Holmes, Reed denied any intention that KOAM's management should actually be approached. Instead, Reed claimed that he merely intended that KODE should not contribute to the problem of low rates in the market by cutting its rates to such a low level that KOAM would have to respond and thereby further depress the market (Gilmore Ex. 33). He conceded that the last paragraph of the memo made no specific reference to this but asserted that the language in the memo was written out of frustration with the problems and complaints of Lee and Holmes about what could and could not be accomplished in the Joplin market (Tr. 2226–27). He stated that he never discussed with them again the matter of "shoring up" KOAM's rates. Reed could not recall any telephone conversation with Shea in which Shea instructed him to make sure that his suggestion to Lee and Holmes was not carried out.

20. Clearly, the thoughts expressed in Reed's memoranda can be construed as favoring a highly questionable course of action; and the recipients of the documents, Holmes, Lee and Shea, so construed them. However, the record is clear that no steps were taken to implement Reed's suggestions.

21. *Markward's Appointment as KODE's General Manager*. On April 12, 1976 Robert Lee's employment as general manager of KODE was terminated by Richard Reed. Reed had long been disappointed with the revenues generated by the station and felt that more aggressive management, particularly in the area of sales, was required. Lee's successor was John S. Markward.

22. Markward had been hired on April 7, and prior to his arrival at KODE he participated in an orientation session at Gilmore's corporate headquarters in Kalamazoo, Michigan. At this time he and Reed discussed at some length Markward's upcoming assignment at KODE. Reed emphasized to him the need for active, personal community and client involvement and instructed Markward to participate fully in civic affairs and quickly introduce himself to business and community leaders (Gilmore Exs. 31, p. 5; 33, pp. 5–6). He also suggested Markward should "meet with [his] counterparts at the other two local television stations to obtain their input concerning the general condition of the market and any insights they might share as to matters of particular community interest and importance" (Gilmore Ex. 31, p. 5). Markward was made aware of the fact that Reed was unhappy with KODE's sales but denied that Reed ever instructed him to seek an arrangement with other stations in the market looking toward an increase in advertising rates (Tr. 1983–85, 2030–31).

23. Several days after his arrival in Joplin, Markward had dinner with Reed and William Acker, a KODE employee. The dinner lasted about two hours and, according to Acker, the conversation covered a wide variety of station-related subjects. Initially, Reed gave Acker a "pep talk" concerning KODE's future prospects (Tr. 1111)[5] and, later in the discussion, emphasized to both Markward and Acker the importance of getting Markward introduced to the community as promptly as possible (Tr. 1117). Reed spent most of the rest of the time, however, talking with Acker about how KODE could compete more effectively in the market against the other two local stations. In particular, Reed solicited Acker's suggestions on how to make KODE a stronger competitor in such areas as programming, local community identification, new equipment, production, sales techniques, pricing, etc. (Tr. 1111–17). Acker also reviewed with Reed the possibility of increasing the overall size of the market by adding Barry County to the ADI, a development that could lead to an increase in advertising rates (Tr. 1114–15). Acker further testified that, at the very end of the two-hour dinner, he believed he heard Reed make a brief comment to Markward to the effect that "[y]ou've got to get with these guys and get the spot rates up in this market," which Acker interpreted as referring to the general managers at the other local television stations (Tr. 1091, 1118–19).

24. Reed flatly denied that he had ever made any suggestion to Markward that he should get together with the other general managers in the market to raise spot rates (Tr. 2266). Markward's recollection of the dinner was that "[i]t was basically conversation between Reed and Acker on ways that we might go to improve the stature of the station in the market place," including "[p]ossible ways to improve in programming, stricter adherence to guidelines in terms of sale of time as well as production charges, doing more in the way of remote sporting events, possibility of adding an important county to our ADI" (Tr. 1899–1900). Markward did not recall any suggestion by Reed that he (Markward) should meet with the other general managers in the market to discuss advertising rates (Tr. 1900).

25. *The Markward-Bengtson Luncheon.* About a week after his arrival in Joplin, Markward arranged to have lunch with Billy Bengtson, the general manager of KOAM. The luncheon, which lasted approximately 60–90 minutes, took place on April 20, 1976 at a busy Joplin restaurant, and was the first time the two men had met. Markward's recollection of the luncheon is set forth in Gilmore Ex. 31, p. 11, and at Tr. 2086–2091. Essentially, he described it as an introductory meeting at which the two exchanged small talk about

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[5] Acker and Robert Lee had been close friends, and he was upset at Lee's departure and concerned about his own future at the station (Tr. 1106–07).

their backgrounds. The general condition of the Joplin television market was also discussed, with Markward expressing his surprise at the low rate level that existed at the local stations. Bengtson, he said, stated that KOAM's national sales representative had expressed a similar view. Markward informed Bengtson that he would be issuing a new spectrum-type rate card in the near future which would give KODE greater flexibility in selling advertising time. He testified, however, that he did not discuss specific dollar amounts for particular rate levels nor did he at any time suggest an agreement between KODE and KOAM to coordinate or mutually arrange their advertising rates.

26. According to Bengtson's testimony at the hearing, the luncheon conversation with Markward centered around their respective families and the local community. Bengtson recalled that Markward asked about his impressions of the Joplin television market and that Bengston responded by acknowledging that KOAM was the leader in the market, price-wise, and generally sold on the rate card. He did not discuss with Markward the details of KOAM's rate structure *vis-a-vis* the other stations in the market; did not ask Markward to raise KODE's rates; did not state that KOAM intended to raise its rates or initiate any change in its existing rate card policies; did not recall that Markward made any suggestions concerning rates; and stated that there was no agreement between Markward and himself, at the luncheon or at any other time, to arrange the rates of their respective stations. He did not view the luncheon as significant in any respect (Mid-Continent Ex. 1, pp. 9–10).

27. In October 1976, about six months after the luncheon occurred, Bengtson was interviewed by FCC investigators regarding price fixing in the Joplin market and, more specifically, the April 20 luncheon with Markward. In his answers to questions from the investigators (Bureau Ex. 10), Bengtson stated that he had never discussed with other station managers in the market "any type of price for advertising time, as it has to do with . . . you know . . . we should all charge X number of dollars for this spot and X number of dollars for this one" (*id.*, p. 1). He recalled the April luncheon with Markward but had no recollection of seeing him since (*id.*, p. 11). He described the meeting as a business lunch during the course of which conditions in the market were discussed. According to his statement he did not say what his rates were and did not ask what KODE's were (*id.*, p. 3). He had no recollection of Markward asking him to do anything in particular with regard to rates, but thought that Markward might have indicated that KODE was going to a single rate card (*id.*, p. 8). He said he had expressed the opinion that the market was underpriced (*id.*, p. 2) and that KOAM tried to stay on its rate card and to avoid "package deals" with advertisers (*id.*, p. 4).

28. *The June 28 Sales Meeting at KODE.* Subsequent to their April luncheon Markward and Bengtson had no personal contact with one another during the time period relevant to the issues in this case. According to their testimony there were several telephone calls between them during the spring and summer of 1976. Markward recalled that one such conversation related to the reorganization of the J.C. Penney Advertising Department, while another concerned background information on labor rates for station engineers (Gilmore Ex. 31, pp. 13–15). Similarly, Bengtson recalled a call about engineers' salaries and another call concerning the program "Nashville On The Road" (Mid-Continent Ex. 1, p. 10).

29. Markward testified that he recalled a "passing remark" by Bengtson during one of these telephone conversations to the effect that he had recently visited his national sales representative in New York City and that the sales rep (the Katz Agency) had suggested that KOAM's advertising rates were too low and should be raised. According to Markward, there was no mention of specific rates, and Bengtson had in fact indicated that he had not reached any final decision on future pricing (Gilmore Ex. 31, pp. 14–15; Tr. 2103–07, 2110–11). There is no evidence of further discussions between the two about station rates. Indeed Bengtson had no recollection of ever discussing rates with Markward except at the April luncheon (Tr. 2458–60).

30. On June 28, 1976, one of numerous sales meetings was held at KODE. Present were Markward, John Holmes and other members of the KODE sales staff. Holmes, who had become aware that his position as sales manager was in jeopardy, secretly recorded the meeting. A partial transcript of the tape (Bureau Ex. 7A) has Markward saying:

> . . . [I] talked to Bengtson yesterday and he said he was in New York last week at the NBC pow-wow and they stopped in, visited with Katz while he was there and they're trying to get him to raise the ante too; I think he's going to go up. He's going to drop his lowest level in prime, which means that would be about I think a 20 dollar bump as I remember it. And he's going to raise his news and he says, you know . . . about time someone (grabbed) (raised) the market and started pricing the way it should be, which is, I think, the hue and cry that Katz has had with them for a long, long time. So he mostly wanted to know, well, you know, would I go along with him. I said yeah, within reason I will. I said Hell, all the pricing I've got on the current card is basically, you know, working off perimeters high and low off of his card. So, he's got a couple more sessions I guess chatting with the troops from the New York, and he said he's going to call me back this week and telling me what the finals are going to be. I don't think he's going to play with daytime but he's talking raising prime and he's talking about access and news, basically. So, we'll see what happens. He also could raise the Tonight Show. You know, the numbers and shares they got . . . there you can bump that a mile . . . .
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> * * * * *
>
> . . . Bengtson said yesterday what, what business he's doing locally, keeping in

> mind, you know, their shares of national vs. local, which is an unusual breakout, he's running you know, 60–65%, he said, national, which is great, as long as national is strong and they're willing to pay more bucks usually. But he said he's selling as low as he's going in prime lately, locally it's been 65. I don't know whether that's a lot of lip service . . .
>
> * * * * *
>
> I just pass that on for what it's worth. Maybe he's blowing smoke . . . and maybe he is getting 65. I don't know. But he is trying to get the prices up. I think he's finally seen the light. Mostly at the urging of Katz, that, you know the market probably is one of the lowest cost per thousand and cost per point or whatever you want to tote it on in the country. I said, " . . . it didn't take me long to spot that, Bill" . . . so we'll see.

31. With regard to these remarks, Markward testified that he did give his sales staff an account of a telephone conversation with Bengtson in which the latter had given some indication that KOAM might be increasing its rates (see para. 29, *supra*). He stated that his remarks were made in order to "inject some pep and enthusiasm into the sales department that things were going to improve and were going to get better" (Tr. 1908). Markward testified that his report included his own predictions and speculation as to what KOAM might do, and went beyond what had been said in his phone conversation with Bengtson. He stated that he told the staff, but not Bengtson, that if KOAM did raise its rates, KODE would be able to raise its rates within reason since, "if the pricing leader of the market goes up, it gives all the other stations an opportunity to go up. That's very prevalent in the industry" (Gilmore Ex. 31, p. 15; Tr. 2109). As to the remark attributed to Bengtson that he would call Markward to tell him "what the finals are going to be," Markward testified that he never received any such call (Tr. 2111).

32. As stated above, Bengtson had no recollection of any telephone conversation with Markward concerning advertising rates. He categorically denied ever indicating to Markward that he would raise KOAM's rates if KODE would go along with a similar rate increase (Tr. 2383–84). Bengtson did, however, visit New York in mid-June to attend an NBC function and stated that it would be "logical" for him to have had lunch with the Katz people while in New York. However, Bengtson denied being told by the Katz Agency that he was selling too low and should raise KOAM's rates (Tr. 2456–58). He further stated that he did not believe he would have told Markward, following his meeting with Katz in June, that he was considering raising rates because, at that time, he did not think he knew what rates were going to be in effect. Bengtson also denied telling Markward that KOAM was going to drop its lowest rate in prime time or that, in fact, KOAM did drop its low rates in prime after June 1976 (Tr. 2456–59).

33. *Rate Changes at KODE and KOAM.*[6] The Bill of Particulars alleges that subsequent to April 1976, KODE, KOAM and KTVJ[7] changed their advertising rates and practices, presumably pursuant to an arrangement of commercial advertising rates entered into by the licensees of the three stations and that one such change was the institution of "single" rate cards by KODE. KODE issued a "single" rate card effective April 26, 1976. This was the type of rate card Markward had used for many years when he was employed at another television station. In the industry as a whole, there had been a recognized trend towards the use of a single rate card, and the concept had been under consideration at KODE since at least 1965 (Tr. 741–42). Markward reached his decision to adopt a single rate card as soon as he arrived at KODE and so advised Holmes (Tr. 743, 1922). This was before he had any contact with anyone from a competing station in the Joplin-Pittsburg market (Gilmore Exs. 31, p. 8; 33, pp. 17–18; Tr. 1922–23).[8]

34. The Bill of Particulars also alleged that subsequent to April 1976 KODE and KTVJ discontinued bonus rebate travel trips given to local advertisers. No such allegation was made with respect to KOAM. The use of trip packages by Lee and Holmes had been criticized for several years prior to April of 1976 by the Gilmore headquarters staff because of the substantial cost and limited sales return of such packages (Gilmore Exs. 30, pp. 5–6; 33, pp. 15–16; Tr. 936–38). Lee eventually made a decision to eliminate trip packages at KODE on or about December 5, 1975, some five months prior to the date alleged in the Bill of Particulars (Gilmore Ex. 19; Tr. 941–42, 969).

35. In addition the Bill of Particulars alleged that KODE discontinued news sponsorships subsequent to April 1976. KODE did discontinue news sponsorships after Markward arrived on April 13, 1976. This action was based, however, on Markward's unilateral decision to phase out the selling of program time on news programs so that future sales would be confined to spot announcements within the news programs. News sponsorships were discontinued by KODE because of Markward's experience in other larger television markets, his general knowledge of industry trends, and his belief that news sponsorships resulted in significant program "clutter" which was distracting to the viewer and detracted from the professionalism of news reporting. Further, Markward believed that greater reve-

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[6] The findings in this portion of the decision are essentially those proposed by Gilmore (see Proposed Findings, paras. 169–188). They have not been disputed by any other party.

[7] KTVJ was originally an applicant in this proceeding; renewal of its license was granted by Summary Decision (see para. 2, *supra*). That decision resolved in favor of the applicant the allegations of collusion contained in the Bill of Particulars.

[8] KOAM had adopted a single rate card in 1974.

nues could be generated from the sale of several spots within a news program rather than tying up the entire program with a few program sponsors. Markward never discussed the dropping of news sponsorships with anyone associated with one of the competing stations in the market (Gilmore Ex. 31, pp. 7–8; Tr. 1924).[9]

36. The Bill of Particulars further alleged that subsequent to April of 1976, KODE, KOAM and KTVJ each instituted a station policy to sell "on the card," presumably pursuant to an arrangement entered into by the three stations. Prior to October 1975, Shea established a policy for all Gilmore stations that sales below the published rate cards (i.e., off-card sales) were to be avoided as much as possible (Gilmore Ex. 30, pp. 12–13). Reed, when he became executive vice president for operations in October of 1975, continued the policy. The desirability of sticking to the rate card and avoiding off-card sales was specifically discussed at the November 1975 meeting of Gilmore station sales managers (Gilmore Ex. 33, pp. 16–17). On March 1, 1976, well before Markward arrived at KODE, Holmes wrote a memorandum to other Gilmore personnel, including Reed, stating:

> We have dropped all packages and are selling strictly from the rate card. Package selling had been going on in this market since 1954, and continues on with both of our competitors! (Gilmore Ex. 15.)

37. Markward also viewed off-card selling as counterproductive and unprofitable (Gilmore Ex. 31, p. 7). During his April 7–9, 1976 orientation session in Kalamazoo, he was advised of Gilmore's policy against off-card sales and was made aware that KODE had previously eliminated off-card selling practices (Gilmore Ex. 31, pp. 4–5; Tr. 1925). He had reached a decision, before his arrival in Joplin, not to reinstitute off-card sales (Tr. 1926). Bengtson testified that he never agreed with any competitor to institute a station policy to sell "on the card," that it had been the general KOAM policy for a considerable period of time prior to 1976 to sell "on the card" to the extent possible, and that this policy did not change following April 1976. Bengtson stated, however, that there were numerous instances before, during and after April 1976 when spots were sold at prices below those appearing on the KOAM rate card (Mid-Continent Ex. 1, pp. 11–12).

38. The Bill of Particulars alleged that subsequent to April of 1976, KODE and KTVJ discontinued saturation packages, presumably pursuant to an arrangement regarding advertising rates. No such charge was made respecting KOAM. KODE dropped all packages by March 1, 1976, and no policy changes were made by

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[9] No charge was made in the Bill of Particulars or at the hearing that either KTVJ or KOAM discontinued or took any other action with respect to news sponsorships subsequent to April of 1976.

KODE regarding saturation packages following April of 1976 (Gilmore Ex. 33, pp. 16–17).

39. The Bill of Particulars alleged that subsequent to April of 1976 KODE discontinued ROS spot announcements, presumably because of an arrangement regarding the sale of television advertising time in the Joplin-Pittsburg market reached among the competing television stations. Similar charges were not made respecting KOAM or KTVJ.

40. ROS or "run of schedule" spot announcements are a form of "cut-rate" selling; others include trip packages, saturation packages and off-card sales which have been discussed above (Gilmore Ex. 33, pp. 16–17). The dropping of ROS rates from the KODE rate card effective April 26, 1976 did not result in an automatic increase in rates. In fact, a comparison between the ROS rates in effect prior to April 1976 (see Gilmore Ex. 8) and the computer records of prices actually charged at KODE during June, July and August of 1976 (see Gilmore Ex. 14; Tr. 1914–15) demonstrates the following:

Time Period	*Pre-April ROS Rate*	*June, July August Prices*
M-F S.O.-10A	$15	$10
M-F 10A-12N	15	15
M-F 12N-330P	25	20
M-F 330-4P	25	25
M-F 4-430P	25	25
M-F 430-5P	25	30
M-F 5-530P	25	40
M-SA 6-630P	50	50
M-SUN 10-1030P	50	50
M-F 1030-1130P	25	20
M-F 1130P-CC	25	10

Thus, with only two half-hour exceptions, the prices actually charged at KODE during the summer of 1976 were either the same as or less than the ROS rates in effect prior to April 1976.

41. The Bill of Particulars also alleged that subsequent to April of 1976 KOAM sold spots at higher positions on its grid card. Similar allegations were not made respecting KODE and KTVJ. The record shows the following respecting the post-April 1976 rates of all three stations. Bengtson testified that he never agreed with any competitor to sell spots at higher positions on the KOAM grid card (Mid-Continent Ex. 1, pp. 11–12). Only very minor rate changes occurred on KOAM pursuant to the 1976 fall schedule and Rate Card A-27, which was issued July 26, 1976 and became effective September 6, 1976. Rate Card A-27 (Mid-Continent Ex. 6), which was first formulated a week or two prior to July 26, 1976 following receipt of the May rating book, did not result from any arrangement with any competitor, but solely from discussions with Katz concerning pricing and the fall programming schedule (Mid-Continent Ex. 1, p. 12).

42. KOAM presented a statistical analysis of its spot rates prepared by Frazier, Gross & Kadlec, Inc. under the supervision of Charles H. Kadlec (Mid-Continent Exs. 8, 9). This statistical analysis was identical in structure to a study submitted by KTVJ in connection with its motion for summary decision. An analysis of changes in KOAM average spot prices and rate card grid positions which considered sales aired between January 1 and August 31, 1976 which were based on orders placed between September 30, 1975 and August 31, 1976 (Mid-Continent Ex. 9) showed no evidence of any agreement on the part of KOAM to arrange prices. Rather, the Mid-Continent study indicates that (1) more KOAM spots were sold at lower grid positions after April 21, 1976 than before that date, and (2) average 30-second KOAM spot prices stayed the same or decreased after April 21, 1976 (Mid-Continent Ex. 8, pp. 1–2).

43. *Ultimate Findings*. There is no evidence that James Gilmore, Hamilton Shea, Richard Reed, Robert Lee or John Holmes of Gilmore Broadcasting Corporation had improper contacts with anyone associated with Mid-Continent that could have resulted in a price-fixing arrangement between KODE and KOAM. In the last analysis, then, the only question to be decided under issues 1(a) and 1(b) is whether John Markward and Billy Bengtson agreed to act in concert to raise station rates and thereafter implemented this agreement.

44. The only relevant contacts between Markward and Bengtson occurred during a single introductory luncheon on April 20, 1976 and a few subsequent phone conversations during the next several months. In themselves, these contacts do not constitute evidence of any conspiracy or combination to arrange advertising rates. Both Markward and Bengtson deny that they ever agreed, or attempted to reach an agreement, to act jointly in regard to advertising rates and selling practices. No persuasive evidence was presented which contradicted their testimony.

45. It is evident that the two men discussed advertising rates in the Joplin-Pittsburg market, but the presiding officer finds nothing in their testimony or in written statements given to Commission investigators from which it can be reasonably inferred that an agreement was struck looking toward an increase in rates in the market.[10] Moreover, there is no evidence in the record of any change in KODE's or KOAM's advertising rates and/or selling practices from which the existence of an improper combination or conspiracy can be inferred. Thus, KODE's discontinuance of trip packages and

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[10] The Bureau contends that Bengtson admitted "promising" to stay on the rate card and "promising" not to cut rates to attract advertisers (Proposed Conclusions, para. 16). The presiding officer construes his statement (Bureau Ex. 10, p. 4) as being rather a representation that KOAM's existing policy was to adhere, to the extent possible, to the published rates.

similar sales practices occurred several months before Markward arrived at the station; Markward's decision to institute a single rate card was made unilaterally and prior to any contact with Bengtson and actually resulted in generally lower rates; KODE's policy of selling "on the card" was instituted before Markward became general manager; the decision to discontinue news sponsorships was unilaterally made; the termination of "run of schedule" rates was accompanied by a new rate card that provided in almost every case rates lower than the preexisting ROS rates; and, finally, KOAM's rates tended to be lower after April 1976 than before.

46. The only evidence suggesting any impropriety on the part of Markward or Bengtson is the tape recording of a KODE sales meeting (para. 30, *supra*), in which Markward was apparently describing to his staff the substance of a recent telephone conversation with Bengtson. Bengtson denied making statements that Markward attributed to him, and Markward testified that his remarks went beyond what was actually said between the two and included his own speculation as to what might occur in the market. It is possible to construe the taped remarks as indicating some sort of collusion, but in light of the later testimony of both Markward and Bengtson the truthfulness of Markward's statements at the meeting is suspect. In any event, the statements in their entirety do not establish that an agreement between the two existed. Rather, Markward's remarks indicate some uncertainty as to what Bengtson and KOAM were going to do: "I think he's going to go up"; "we'll see what happens"; "[m]aybe he's blowing smoke"; ". . . so we'll see."

47. In sum, there is no direct evidence that the April 20 luncheon produced an agreement between Markward and Bengtson. And there is no evidence of subsequent actions by the stations which would suggest the existence of a rate-fixing arrangement. It is found, therefore, that the licensees did not engage in anticompetitive practices and did not adjust their advertising rates pursuant to an agreement reached by Markward and Bengtson.

Issue 1(c) - Misrepresentation/Lack of Candor

48. The Bill of Particulars charges John Markward and Billy Bengtson with misrepresentation or lack of candor in statements made to the Commission in the course of its inquiry into alleged rate fixing at KODE and KOAM. In its proposed findings and conclusions, the Bureau contends that five other individuals associated with Gilmore misrepresented or were less than candid in their testimony during the hearing.

49. *James S. Gilmore*. Richard Reed's employment as executive vice president of Gilmore was terminated on March 1, 1977. He was informed of his dismissal by James Gilmore during a one-hour conversation between the two that occurred in February. Reed stated

that he was not given a reason for the dismissal, but that at one point he asked Gilmore whether it related to the recently instituted inquiry by the Commission into allegations of price fixing in the Joplin market. Reed testified that Gilmore responded by saying: "Where there's smoke, there's fire" (Tr. 2318), a remark Reed interpreted as signifying the Commission's investigation "was the crux of the problem, that perhaps broke the camel's back. But that's my own supposition" (Tr. 2319). Reed later received a letter from Shea with reference to his termination which gave no indication that it related to the Joplin investigation (Tr. 2321–23).

50. The substance of Gilmore's testimony is that he was "concerned" about the allegations which led to the Commission's inquiry (Tr. 1401) but that as a result of the company's own investigation he was satisfied that no improper conduct had occurred (Gilmore Ex. 22, pp. 8–11). On the other hand, he was concerned about Reed's performance, particularly his relationship with the managers of Gilmore's stations. He was unhappy with the manner in which Robert Lee had been dismissed at KODE and had received complaints from other station managers about Reed's dictatorial methods (Tr. 1484, 1498; Gilmore Ex. 22, p. 12). It was essentially for these reasons, according to his testimony, that Reed was relieved of his duties.

51. The Bureau contends that this testimony is unbelievable and should be rejected as lacking in candor. The presiding officer does not view Gilmore's reasons for firing Reed as being of major importance to this proceeding, but does not regard his testimony as being inherently incredible. A determination that he was not truthful in his testimony would rest entirely on speculation.

52. *Hamilton Shea.* The Bureau argues that Shea lied when he denied urging KODE's management to meet with officials of KOAM to urge them to increase that station's advertising rates (para. 12, *supra*) and also misrepresented the facts concerning his corrective actions on receiving Reed's two memoranda (para. 18, *supra*). No finding has been made that Shea told KODE's management to engage in improper contacts with other stations in the Joplin market. Accordingly, no finding can be made that his denial that he did so constitutes misrepresentation. Shea's actions on receiving Reed's memoranda consisted, according to his testimony, of calling Reed and telling him that the course of action seemingly suggested by Reed should not be pursued. That seven years later Reed did not recall the conversation is hardly a basis for finding that Shea's testimony was knowingly false.

53. *Richard Reed.* The Bureau contends that Reed testified falsely when he denied instructing Lee and Holmes orally and in writing (i.e., his memorandum of April 29, 1975) to seek an agreement with the management of KOAM to raise advertising rates

in the market (see para. 19, *supra*). Notwithstanding Reed's denials, the weight of the evidence is to the effect that he held the notion that persuading KOAM to increase its rates was one way to improve KODE's revenues; and that he suggested this to Shea, Lee and Holmes. However, rejecting a person's testimony is not tantamount to a finding that the testimony was knowingly false. Thus, it is quite possible that Reed suffered from what the Commission has described as a "faulty shading of recollection," perhaps unconsciously influenced by a desire to reflect no discredit on himself. *Grenco, Inc.*, 39 F.C.C. 2d 732, 737 (1973). In any event, at the time of the hearing Reed was not associated with Gilmore Broadcasting Corporation. Any lack of truthfulness in his testimony would seem irrelevant to Gilmore's qualifications to be a licensee.

54. *John Markward*. The Bureau contends that Markward misrepresented material facts when he denied making statements to his sales staff about getting together with other station managers to raise rates and that his statement to Commission investigators contained misrepresentations. The premise of these assertions is that Markward intended to strike an agreement with KOAM looking toward an increase in rates. No finding has been made that Markward harbored such an intent or that an agreement was reached. The presiding officer is therefore unable to find that Markward's statement and testimony on these matters wilfully misrepresented material facts.[11]

55. Finally, the Bureau contends that Markward and Bengtson misrepresented facts and were lacking in candor regarding what was said at their luncheon and in subsequent conversations. The presiding officer has evaluated their testimony in arriving at his findings on the price-fixing issues, and sees no reason to revisit the matter here. The substance of their testimony has been accepted, and while their accounts differ in some particulars, this is not unnatural, especially in view of the time that has elapsed since the events occurred.

Issue 1(d)—Rates Charged Political Candidates

56. This issue seeks to determine whether during 1976 KODE charged candidates for political office rates higher than those charged commercial advertisers.[12] It is undisputed that KODE

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[11] The Bureau also asserts that Markward wilfully concealed details of his past employment. It appears that during the course of this proceeding Markward failed to reveal that for about three months in late 1975 and early 1976, he was employed at a radio station in Bay City, Michigan. He was fired from this position, a fact he reluctantly conceded at the hearing (Tr. 1968–79). The incident reflects little credit on Markward, but his employment at the Bay City station is in no way material to the issues in this case.

[12] Section 315(b) of the Communications Act requires that during the 45 days

overcharged a a number of political candidates during that year. In the campaign preceding an election held in April, four candidates were charged more than the station's lowest unit charge. The total amount of the overcharge was $78.75. With respect to the August primary election campaign, 13 candidates were charged a total of $4,247.13 in excess of that which would have been billed if the lowest unit charge had been used. In the November general election, two candidates were overbilled in the amount of $765.[13] It is also undisputed that refunds were made to the candidates; refunds from the April election were made on November 3 and refunds from the later elections were made on October 11.

57. When Section 315 was amended in 1972, Gilmore's legal counsel prepared a memorandum containing guidelines for applying the statute. The memorandum, which was distributed to personnel at the Gilmore stations, made reference to and enclosed a copy of guidelines which had been issued by the Commission. Specific reference was made to the "lowest unit charge" requirement. In the fall of 1975 Gilmore's counsel, at the request of company officials, prepared a political primer which was distributed to general managers and sales managers during a sales meeting in November. Again there was reference to the lowest unit charge provision.

58. In April 1976 a local election was held in Joplin. At the time John Holmes was sales manager and Robert Lee was general manager. According to Lee, Holmes was instructed to adhere to the lowest unit charge requirement (Tr. 954–56). Holmes recalled that during the course of the campaign, he came to believe that the rates he had charged were not in strict compliance with the statute and that "some of the local candidates could have paid a few dollars more" than they should have (Tr. 709–10). He could not remember whether he and Lee attempted to correct the overcharges, but thought that the rates themselves had been adjusted (Tr. 709–11). From the testimony it appears that the problem was this: the rates charged political candidates were consistent with the lowest rates on the station's rate card, but did not take into account the fact that the station charged lower "off-card" rates to some advertisers that purchased ROS (run of schedule) spots.

59. Markward replaced Lee as general manager of KODE on April 13, 1976; this was after the April election but prior to the primary election held in August and the general election held in November. When Markward arrived in Joplin, he began preparation

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preceding a primary and the 60 days preceding a general election, candidates for public office shall be charged "the lowest unit charge of the station for the same class and amount of time. . . ."

[13] At the hearing, Bureau counsel expressed the view that the November election was not "at issue" (Tr. 1881), and it has been referred to only briefly in these findings.

of a new single spectrum-type rate card for commercial advertisers. The new rate card, which became effective April 26, 1976 as Rate Card No. 26, replaced the previous separate local and national rate cards. This was the first single rate card used by KODE. Rather than setting forth one specific rate for each daypart, the card set forth a grid or spectrum of different levels of rates for each time period (three rate levels for nonprime dayparts and eight rate levels for prime-time dayparts).

60. During his April 7–9, 1976 orientation in Kalamazoo prior to coming to Joplin, Markward had been advised that KODE had already instituted a station policy of adhering to rate card levels in selling time rather than selling "off-card" or below rate card levels. The previous month Holmes had written a memorandum to his counterparts at other Gilmore stations and to headquarters personnel which included the statement, "[w]e have dropped all packages and are selling strictly from the rate card" (Gilmore Exs. 15, 33). After Markward arrived at KODE, he instructed the sales staff that with respect to the new rate card, they were to continue the practice of selling only at published rate levels appearing on the card.

61. With the approach of the August election campaign, Holmes presented to Markward a suggested political rate card for the August 1976 elections. The card was apparently the same as the one prepared by Holmes and used with respect to the April 1976 election (*cf.* Gilmore Ex. 27, App. B with Gilmore Ex. 28, App. A). Markward advised Holmes that the card was obsolete. Instead Markward directed that time purchased by candidates involved in the August 1976 primary election should be sold "at the same rate levels we were currently selling the same daypart to commercial advertisers," based on the rate card that became effective April 26, 1976 (Gilmore Ex. 27, p. 3). Markward's instructions stemmed primarily from his understanding that no off-card sales had been made for some time prior to the August 1976 election (Tr. 1984, 2000–02, 2004–05).

62. During discussions at the station regarding a political rate for the August elections, Holmes and Bob Barry, KODE's regional sales manager, mentioned to Markward the difficulties the station had encountered with the lowest unit rate requirement during the April election (Tr. 421–22, 716–17; Bureau Ex. 22A, p. 1). One such occasion was a sales meeting held on July 6 when Barry referred to a lower than rate card rate that had been given to Proctor and Gamble. Markward, who was not at KODE during that period, seemed unfamiliar with the matter. Holmes interjected to point out that "at that time though we had an ROS . . ." (Bureau Ex. 22A, p. 1), implying, it would seem, that the problem no longer existed. On another occasion, Barry questioned Markward's interpretations of the lowest unit charge requirement. Markward responded by reading a passage from the NAB "Political Broadcast Catechism" which

Barry concluded "fully supported" Markward's position (Gilmore Ex. 29, p. 2).

63. At no time did Barry inform Markward of any specific off-card sales in effect at the station during the applicable periods prior to the August primary and November general elections; nor did Markward ever indicate in Barry's presence that he was aware the station had made off-card sales during that period (Gilmore Ex. 29, pp. 2–3; Tr. 1877). Likewise, although Holmes testified that he had expressed misgivings to Markward about adhering to the "lowest rate card rate" for political candidates, there is no evidence that he provided Markward with any specific instance where the station was selling time to commercial advertisers at less than the rate card rates during the time period that the "lowest unit charge" requirement of Section 315 would have applied to the August election.[14]

64. After the election was over Markward called Gilmore's Washington counsel to discuss his understanding of the lowest unit rate requirement. Counsel advised Markward that the instructions he had been following appeared to be correct, but emphasized that no matter what levels were specified on the April 26, 1976 single rate card any sales at below rate card levels made during the statutory 45 and 60-day periods prior to elections would determine the rates to be charged political candidates (Gilmore Ex. 27, p. 3). Markward responded that he was not aware of any applicable off-card sales; that his understanding was that even before he became general manager of KODE the station was following the policy of selling only at published rate levels; and that neither Holmes nor anyone else had ever mentioned to him the existence of any applicable off-card sales. Markward concluded the discussion by stating that he would nevertheless "double-check" whether there had been any applicable off-card sales (Gilmore Ex. 27, pp. 3–4).

65. Based on this conversation, Markward ordered a review of the station's records to determine whether any off-card sales had been made which would affect rates charged to candidates in the August election. It was ascertained that due to preexisting contracts which were still in effect at least two advertisers had rates during the 45-day period prior to the August 1976 election that were below those shown on the existing rate card. KODE then issued a new revised political rate card which properly reflected all applicable off-card sales. The new political rate card was used during the

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[14] The Bureau proposes a finding to the effect that Holmes told Markward that lower than rate card rates were charged Wrigley's Gum and Dad's Root Beer. The transcript is not entirely clear, but it would appear from the context that Holmes was actually describing a conversation with Lee rather than Markward. In any event the reference was to a time period preceding the April election, not the August election (Tr. 717–18, 1876).

approximately one-month period that remained prior to the November general election.

66. In addition, a review was made of the charges that had already been made to political candidates with respect to the August primary election and the November general election. Checks to all of these candidates, providing for a refund of the incorrect prior overcharges, were mailed on October 11, 1976. Markward also directed that a similar study be undertaken with respect to the April 1976 local election and on November 3, 1976 refund checks were mailed to the four individuals who had, according to station records, been overcharged.

67. *Ultimate Findings*. The record shows that, during the campaigns preceding elections in April and August 1976 and during a part of the campaign that preceded the November election, KODE overcharged a number of candidates. Though the lowest rate card rate was used, the station had several accounts that received a lower rate, and this, rather than the rate card, was the basis on which the "lowest unit charge" required by Section 315(b) should have been calculated. The error was discovered in the fall of 1976 and an appropriate adjustment was made for what remained of the November campaign. In addition all candidates who had been overcharged were reimbursed. These corrective actions were taken prior to the Commission's investigation into the matter.

68. The presiding officer is persuaded that none of these violations was intentional. The April overcharges were the result of an oversight on the part of Holmes and Lee; and the others arose from a misunderstanding by Markward regarding the lowest actual rate that the station had been making available to certain advertisers. Nonetheless, any violation of Section 315(b), inadvertent or otherwise, is of serious concern to the Commission. See, e.g., *Pacific Media Corp.*, 51 P&F R.R. 2d 1304 (1982). In the present case it is difficult to fault Gilmore's top management officials for the mistakes since the company seemingly took reasonable measures to inform station managers of political broadcast requirements and their responsibility for complying with them. However, the manner in which Markward discharged this responsibility leaves something to be desired. He was aware that during the April campaign, the station had experienced some difficulty with the lowest unit charge requirement. While he had reason to believe that the rate card in use during the summer and fall reflected the lowest current rate being charged by the station, it is difficult to understand why he ruled out the possibility that, through a prior agreement or otherwise, some advertisers might still be paying a lower rate. In other words, if a review of station records in September could reveal overcharges, why could not such a review have been made in June and the problem avoided?

69. The subject of rates for political candidates is clearly a sensitive one; Congress adopted the lowest unit charge requirement to permit wider use of the broadcast medium by candidates for public office. Strict compliance with this and related requirements of Section 315 is one of a licensee's highest obligations. In the circumstances, the validity of Markward's assumptions regarding KODE's lowest unit charge should have been tested before rather than after the fact.

Issue 2—Meritorious Programming Carried by KODE [15]

70. KODE is affiliated with the ABC television network and offers its viewers a programming structure based on network, recorded and local live entertainment, public affairs, informational, instructional and educational programs. In addition to presenting ABC programs, KODE engages in local programming efforts which include weekly 30-minute local live public affairs programs, weekly editorials and daily 5-minute presentations designed to serve groups, organizations, individuals and governmental agencies within the station's service area.

71. The KODE news department provides coverage of local and regional news and weather. National and regional news is supplied through the facilities of the ABC television network and the Associated Press Wire Service. Local facilities include a radar system for emergency weather conditions and live microwave broadcast units for the coverage of local news.

72. KODE devotes an estimated 35% of its news programming to the coverage of regional and local news. The station utilizes a combined news department (with KODE(AM)) consisting of 15 reporters, writers and producers. The news department, as of 1976, had at its disposal videotape camera and editing facilities, protable tape recorders, telephone beeper facilities, police and fire department scanners and a reference library. The news department also participated in various arrangements with area radio and television stations for the sharing of facilities and/or news programs; subscribed to area newspapers and news-related publications; and had available the national and regional Associated Press News Services and the National Weather Wire Service. The local office of the Federal Aviation Agency furnished weather information to the news department, which also received reports from sheriffs' departments in the states of Missouri, Kansas, Oklahoma and Arkansas. The weather bureaus in Springfield and Kansas City, as well as the local civil defense department, were regularly contacted with respect to severe weather reports. KODE also operated a weather radar

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[15] This issue was added at Gilmore's request. See FCC 78M-1327, released September 11, 1978.

system. In addition to providing local and regional news coverage KODE presented editorials which addressed issues of particular relevance to its audience.

73. KODE and/or its AM counterpart have received seven first-place awards from the Missouri Broadcasters Association for television and radio editorials. The stations also received other awards, including an honorable mention award for investigative reporting received by KODE from the Missouri Broadcasters Association in 1976 for a program entitled "Province of Hell," which addressed conditions in 20-area correctional facilities. Awards and commendations have been received from other groups and organizations, including the American Red Cross, the American Heart Association, the Muscular Dystrophy Association, the Exchange Club of Joplin, the Foster Parents Plan, the United Way, various branches of the Armed Forces, the National Oceanic and Atmospheric Administration, the Salvation Army, the Kidney Foundation of Kansas and Western Missouri, the American Chiropractic Association and the Joplin Jaycees.

74. The pending 1976 KODE renewal application shows that a total of 264 PSAs were broadcast during the composite week concerned, of which at least 42 related to programs, activities or services of organizations or groups within the KODE service area. The station also participated annually in the Jerry Lewis Muscular Dystrophy Telethon and took part in other local telethons, such as the Ozark Bible College Telethon to raise funds for a new library.

75. In cooperation with other television stations licensed to Gilmore, KODE produced and aired over a 14-week period in 1975 a series of 30-minute children's programs entitled "Everything Under the Sun." These programs were designed to provide children 6–12 years of age with a knowledge of their own environment as well as an understanding of how people live in various parts of the country. Other programs designed for children were also aired.

76. A quantitative analysis of KODE's programs shows the following:

	Public Affairs		
	1974	*1975*	*1976*
6 AM—Midnight			
All[16]	1.8	4.0	2.9
Local	0.3	1.4	0.4
6 PM—11 PM			
All	4.0	6.0	0.6
Local	0.2	3.0	0.2
Midnight—6 AM			

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[16] Local and nonlocal programming.

Public Affairs

	1974	*1975*	*1976*
All	—[17]	0.0	4.7
Local	—	0.0	0.0

News

		1974	*1975*
6 AM—Midnight			
All	7.4	7.6	9.5
Local	5.8	5.6	5.3
6 PM—11 PM			
All	12.0	13.0	12.8
Local	6.5	6.2	5.9
Midnight—6 AM			
All	—	8.0	10.4
Local	—	4.2	6.1

Other Nonentertainment/Nonsports

	1974	*1975*	*1976*
6 AM—Midnight			
All	8.2	13.7	11.8
Local	1.0	1.3	0.9
6 PM—11 PM			
All	0.0	3.9	3.1
Local	0.0	0.0	0.0
Midnight—6 AM			
All	—	5.4	4.3
Local	—	0.8	0.0

77. *Ultimate Findings*. The purpose of a meritorious programming issue is to permit a licensee to demonstrate that, notwithstanding misconduct of a potentially disqualifying nature, the program service offered has been of such a high caliber that the public interest would be served by renewing the station's license. See *WIGO, Inc.*, 85 F.C.C. 2d 196 (1981). As will be stated *infra*, it has been determined that Gilmore did not engage in conduct that would warrant denial of its application for renewal of the KODE license. A description of the station's programming during the relevant license term has been set forth above, but a judgment on the merit of that programming is unnecessary for purposes of this decision. The matter will, however, be briefly addressed, since a reviewing body might disagree with the presiding officer's resolution of the other issues.

78. Though no information has been provided to permit a comparison of KODE's programming with those of other stations in the Joplin market or stations in markets with similar characteristics, it would appear both from the descriptive data and quantitative

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[17] In 1974 KODE only operated a total 148 minutes in the midnight - 6 AM time period during the composite week. For this reason, statistics for this time period are excluded.

analysis that KODE's efforts in the news area have been considerable. On the other hand, its showing with regard to public affairs and other nonentertainment programming is rather modest. If this were a comparative contest between a renewal applicant and a newcomer, KODE would be entitled to some degree of "renewal expectancy." See *Cowles Broadcasting, Inc.*, 86 F.C.C. 2d 993 (1981). However, had the evidence adduced under the other issues been sufficiently strong to warrant disqualification, it is doubtful that the station's broadcast record could serve to alter that result.

Conclusions

1. It has been found that Gilmore and Mid-Continent did not engage in anticompetitive conduct by combining or conspiring to arrange advertising rates. Issues 1(a) and 1(b) are therefore resolved in favor of the applicants.

2. No finding has been made that officials of Gilmore or Mid-Continent made misrepresentations or were lacking in candor with respect to matters relevant to issues 1(a) and 1(b). Issue 1(c) is therefore resolved in favor of the applicants.

3. Issue 1(d) concerns the rates KODE charged political candidates during several election campaigns in 1976. It has been found that the rates were in violation of Section 315(b) of the Communications Act in that they were higher than the station's lowest unit charge for the same class and amount of time. It was further found that the overcharges were unintentional but that greater care should have been exercised by the station's general manager. These violations appear uncharacteristic of Gilmore's overall operations; moreover, the corporation had made reasonable efforts to inform personnel at its stations of their obligations under the statute and acted promptly to rectify these errors once they were discovered.[18] As previously noted (Findings, para. 69), the lowest unit charge requirement is an essential aspect of the regulatory scheme mandated by the Congress, and Gilmore is reminded of its continuing responsibility to achieve compliance with its terms. In the circumstances of this case, however, no further action is warranted. See *Midnight Sun Broadcasters, Inc.*, 40 P&F R.R. 2d 660 (1977); *Harbenito Radio Corp.*, 36 P&F R.R. 2d 563 (1976).

4. In view of the foregoing, it is concluded that the applicants have the requisite qualifications to remain licensees of the Commission and that the public interest would be served by a grant of the applications.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party or is reviewed by the Commission on its own motion in accordance with the provisions of Rule 1.276, the applications of Gilmore Broadcasting Corporation and Mid-Continent Telecasting, Inc. for renewal of the licenses of Stations KODE-TV and KOAM-TV, respectively, ARE GRANTED.[19]

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[18] All candidates received refunds for the overcharges.

FEDERAL COMMUNICATIONS COMMISSION
JOHN H. CONLIN, *Administrative Law Judge*

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[19] In the event exceptions are not filed and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Amateur Radio Service
Decision, Effective Date of
Hearing, Extension of Time
Hearing, Procedures, Waiver of
Interference, Willful
License Revocation

Commission upholds Private Radio Bureau's revocation and suspension of amateur licenses based on licensee's malicious interference to communications of other amateurs. Licensee waived hearing by failing to request hearing by specified date. Licensee's FOIA request for Bureau's evidence did not justify extension of that date.
–*Harold R. Claypoole*

FCC 83–446

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Revocation of License of
HAROLD R. CLAYPOOLE
P.O. Box 5813
San Diego, California 92105
License of Station N6BII
in the Amateur Radio Service
Suspension of License of
HAROLD R. CLAYPOOLE
P.O. Box 5813
San Diego, California 92105
Amateur General Class
Operator License

PR-2105-S

MEMORANDUM OPINION AND ORDER

(Adopted: September 26, 1983 Released: September 30, 1983)

BY THE COMMISSION:

1. The Commission has before it Harold R. Claypoole's April 15, 1983, application for review of the Chief, Private Radio Bureau's (the "Bureau"), Order issued March 25, 1983.[1] That order revoked

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[1] A corrected copy, containing some minor corrections, was mailed on April 6, 1983.

Claypoole's license for Amateur radio station N6BII and affirmed the suspension of Claypoole's General Class Amateur radio operator license for the remainder of its term. The Commission received supplementary filings from Claypoole on May 24 and July 11, 1983. However, they will not be considered in this proceeding, since they were received long after April 24, 1983, the expiration of the 30 day filing period prescribed by Section 1.113 of the Commission's Rules.

2. This proceeding began on December 22, 1982, when the Commission suspended Claypoole's General Class Amateur radio operator license for term[2] and ordered him to show cause why his Amateur station license should not be revoked. Claypoole was originally required to respond to the order by January 21, 1983. Upon Claypoole's request an extension of the reply time, until March 14, 1983, was granted. He was informed that, if he did not request a hearing by that date, he would be considered to have waived hearing and the matter would be resolved administratively. On February 22, 1983, Claypoole filed a Freedom of Information Act ("FOIA") request for "any and all letters, papers, tapes, complaints, documents, etc. concerning this case." On March 4, 1983, the Bureau sent Claypoole a letter which partially granted and partially denied his FOIA request and reminded him that failure to respond to the Order to Show Cause by March 14, 1983, would constitute a waiver of his right to a hearing. Claypoole failed to request a hearing by that date. Instead, in a letter dated March 10, 1983, and received by the Commission March 14, 1983, he requested a further 60 day extension of the reply time. Claypoole stated that he was appealing the Bureau's partial denial of his FOIA request[3] and that he needed the material which he was denied in order to decide whether to request a hearing.

3. By letter of March 25, 1983, the Bureau denied Claypoole's request for a further extension of the reply time. In reviewing this action, we consider that the Bureau would be remiss in carrying out its responsibilities in the public interest if it allowed a respondent a lengthy delay in deciding whether to request a hearing. Where the basis for the proceeding is alleged violation of the Commission's Rules, speed in resolving the proceeding is particularly essential. Sanctions are more effective, both as against the violator and as a warning to others, when applied soon after the violation. Also, a speedy resolution takes into account the interests of other, law abiding radio operators who are affected by the violator's operation.

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[2] The order specified that the suspension of Claypoole's operator license would be held in abeyance if he requested a hearing or submitted a statement concerning the issues.

[3] On June 17, 1983, the Commission released an order upholding the partial denial of Claypoole's FOIA request.

Thus, an extension of time in such a case should not be granted without a compelling reason.

4. Claypoole's stated reason for requesting a further extension of time was without merit, as the Bureau correctly concluded. Claypoole had no need of the additional material to decide whether to request a hearing. The decision whether to request a hearing should proceed from the respondent's knowledge of his own actions rather than from an assessment of the evidence likely to be used against him.[4]

5. Claypoole's failure to request a hearing by March 14, 1983, constituted a waiver of his right to a hearing under Section 1.92(a)(1) of the Commission's Rules. On March 25, 1983, the Chief Administrative Law Judge certified this matter for administrative disposition. On the same day the Bureau revoked Claypoole's station license and ended his operating authority. The Bureau's actions were taken under the authority contained in Sections 312(a)(2), (a)(4) and (c) and 303(m)(1)(A), (D)(2) and (E) of the Communications Act of 1934, as amended, and delegated to the Bureau by Section 0.331 of the Commission's Rules.

6. Claypoole's application for review was timely filed on April 15, 1983. In it he states generally that he is appealing the Bureau's action, without indicating any specific basis for review.

7. By way of background, Claypoole had been an Amateur of long standing. He was first licensed in the Amateur Radio Service in 1952. That license expired and in 1960 Claypoole applied for a new Amateur radio station license and a Conditional Class Amateur radio operator license. Claypoole's 1960 application was designated for hearing on the basis of unlicensed operation in violation of Sections 301 and 318 of the Communications Act and "transmissions of an indecent and obscene nature." The application was denied by the Initial Decision of Hearing Examiner David I. Kraushaar, released October 25, 1961 (FCC 61D-159). Claypoole was subsequently relicensed, on December 18, 1962, after he made promises of compliance. He allowed his licenses to expire in 1973, but sought licenses again in 1979. His most recent licenses were granted March 6, 1979, for a five year term.

8. On March 1, 1982 the Commission began to receive complaints about Claypoole's operation. In response to the complaints personnel from the Commission's San Diego, California, office monitored Claypoole's transmissions on March 3 and 19, 1982, and personnel from the Commission's Ferndale, Washington, monitoring station did so on March 18, 1982.

9. On March 3, 1982, Commission engineers from the San Diego

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[4] Of course, once a respondent decides on a hearing, the Bureau's evidence would be made available to him in accordance with the prehearing procedures specified in the Rules.

office monitored Claypoole causing interference to the communications of other operators by making transmissions, including unmodulated carriers, directly over the ongoing transmissions of the other operators. This was in willful violation of Section 97.125 of the Commission's Rules (malicious interference). Claypoole was also broadcasting recorded material, including music, in willful violation of Sections 97.113 and 97.115 of the Rules. During these transmissions, Claypoole used the false call sign WB6AAT (See Section 97.121 of the Rules). On March 18, 1982, Commission personnel at the Ferndale, Washington, monitoring station observed Claypoole once again maliciously interfering with other operators' communications and identifying with the false call sign WB6AAT. During the March 18, 1982, transmissions Claypoole repeatedly stated that his purpose was to cause the Commission to issue him a "citation." On March 19, 1982, the engineers in San Diego inspected Claypoole's station.

10. Of further concern is that, following the inspection, Claypoole telephoned the Federal Bureau of Investigation and stated that, if Commission engineer Grigsby (of the San Diego office) returned to his house, he would shoot Grigsby to death with a .45 caliber pistol and hit him over the head with a beer bottle. Claypoole then called the Commission office in San Diego and stated that he wanted Grigsby to return to his house because he "would be waiting for the son of a bitch with a beer bottle to break over his head and a .45 caliber pistol." Following that telephone call the Commission in San Diego monitored Claypoole once again maliciously interfering with the communications of other Amateurs and using a false call sign. Claypoole's transmissions included: "Where are you, Grigsby? . . . I'm going to throw a beer bottle right through that fucker's head."

11. As a result of the communications described above the Commission's Ferndale, Washington, monitoring station and its San Diego, California, office issued Official Notices of Violation to Claypoole on April 1 and 23, 1982, respectively. In replies dated June 7 and 21, 1982, as well as in the letter dated March 10, 1983, Claypoole claimed he was not home on the days in question. In a telephone conversation with Commission personnel on May 14, 1982, Claypoole claimed that he could not have been operating on one of the dates, March 18, 1982, because his wife was hospitalized then. He reiterated this claim in his letter of March 10, 1983.

12. As the Bureau concluded in its Order issued March 25, 1983, Claypoole's claim that he was not at home when the violations occurred cannot be accepted. The transmissions monitored on March 3 and 19, 1982, were electronically traced by Commission engineers to Claypoole's residence at 3204 Marlborough Avenue, San Diego, California. The engineers used sophisticated electronic direction finding techniques. Additionally, the engineers determined that Claypoole's voice was the same as that heard over the air by replaying a tape recording of the March 3, 1982, transmissions

immediately after the inspection on March 19, 1982. Long range direction bearings indicated that the transmissions monitored on March 18, 1982, came from the San Diego area. Claypoole's claim that he could not have made the March 18, 1982, transmissions because his wife was hospitalized then is undercut by the fact that during the March 18, 1982, transmissions, he actually stated that his wife was hospitalized. Claypoole's claims are further rebutted by the fact that transmissions monitored on March 3 and 19, 1982, were identified by Claypoole's call sign, N6BII, and that transmissions on all three dates were identified by his former call sign WB6AAT, which he prefers.[5] WB6AAT was not assigned to any Amateur radio station in March 1982. Nothing in Claypoole's application for review warrants any change in the Bureau's conclusions.

13. In light of the facts discussed above, the Bureau's March 25, 1983, order properly concluded that Claypoole wilfully and repeatedly violated Sections 97.125 (wilful and malicious interference) and 97.121 (use of false call sign) of the Commission's Rules on March 3, 18 and 19, 1982; and wilfully violated Sections 97.113 (broadcasting) and 97.115 (transmitting music) on March 3, 1982.

14. Malicious interference in any radio service is a very serious matter. It is the most serious violation found in the Amateur Radio Service, warranting the most stringent penalty. Claypoole's malicious interference has been detected on three different occasions. His malicious interference together with his other violations clearly disqualifies him from holding an Amateur license and warrants license revocation and suspension. See *Henry P. Armstrong*, 53 RR2d 474 (Rev. Bd. 1983), *recon. denied* FCC 83 R-36: *Donald E. Gilbeau*, 91 FCC 2d 98 (Rev. Bd. 1982); and *Gary W. Kerr*, 91 FCC 2d 107 (Rev. Bd. 1982).

15. Claypoole has shown disregard for the Commission's licensing authority. His operating privileges were terminated by the Bureau's March 25, 1983, order which was by its terms effective immediately. The filing of the application for review did not stay the effect of the order. (See Section 1.102(b) of the Rules). He received copies of that order and was warned in telephone conversations with members of the Commission's staff in San Diego and Washington on April 1 and April 5, 1983 that he had no authority to operate. Nevertheless, he has stated his intent to continue to operate in the telephone conversations and in a mailgram dated April 3, 1983. On May 10, 1983, Commission personnel monitored Amateur transmissions by Claypoole on the frequency 7257 kHz. Continued operation by Claypoole will not be tolerated. If there is evidence of further operation by Claypoole after the date of this Memorandum Opinion

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[5] Claypoole contended during the March 18, 1982, transmissions and in letters to the Commission dated November 23 and December 31, 1981, that his former call should be restored to him. His request was denied in a letter of December 24, 1981. The denial was reaffirmed in a letter of March 16, 1982.

and Order, the Commission will seek criminal prosecution for violation of Section 301 of the Communications Act of 1934, as amended.

16. In his application for review Claypoole fails to state any basis for changing the Commission's action. Our review has shown that none exists. It is therefore ordered that the revocation of Claypoole's license for Amateur radio station N6BII and the suspension of his General Class Amateur radio operator license ARE AFFIRMED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

CATV Program Exclusivity, Network Programming
CATV Show Cause Proceedings
CATV Special Relief
Rules, Waiver of

Requests for waiver of Section 76.92 of the Rules granted. Petitioner demonstrated projected audience losses to stations from waivers of non-duplication protection of only 2.54% and 3.16%. Order to show cause concerning alleged violation of rules denied.
–*Manhattan Cable TV Service, Inc.*

FCC 83–436

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
MANHATTAN CABLE TV SERVICE, INC.	CSR-1786 CSC-238 KS0042
Manhattan, Kansas	
Petition for Special Relief	
Petition for Order to Show Cause	

MEMORANDUM OPINION AND ORDER

(Adopted: September 22, 1983 Released: October 14, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT.

Introduction

1. On June 19, 1980, Manhattan Cable TV Service, Inc. (hereinafter "Manhattan Cable"), operator of a cable television system serving Manhattan, Kansas, filed a petition for special relief (CSR-1786) seeking a waiver of Section 76.92 of the Commission's Rules. Absent the requested waiver, Manhattan Cable would have to honor the request for network program nonduplication protection made of it by Stauffer Communications, Inc. (hereinafter "WIBW-TV"), licensee of Station WIBW-TV (CBS, Channel 13), Topeka, Kansas.[1] WIBW-TV has opposed Manhattan Cable's petition, and Manhattan

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[1] WIBW-TV also occasionally carries ABC programming, for which the station also seeks protection.

Cable has replied. In addition, on September 24, 1980, Studio Broadcasting System Division of Highwood Service, Inc. (hereinafter "KTSB"), licensee of Television Broadcast Station KTSB (NBC, Channel 27), Topeka, Kansas, filed a "Petition for Order to Show Cause" (CSC-238), directed against Manhattan Cable's alleged failure to provide nonduplication protection as required by the Commission's Rules. KTSB's petition is opposed by Manhattan Cable, which concurrently filed a second petition for special relief directed against KTSB's request for nonduplication protection. KTSB has supplemented its petition, and replied to Manhattan Cable's opposition thereto, as well as opposing Manhattan Cable's second special relief petition. Manhattan Cable has replied to this latter opposition.

Summary of Pleadings

Manhattan Cable and WIBW-TV (CSR-1786)

2. In support of its petition, Manhattan Cable notes that it has owned and operated its Manhattan cable system, which is located within the Topeka 55-mile zone, since December 1961. Manhattan Cable states that it was first requested to provide nonduplication protection to WIBW-TV on December 24, 1969.[2] Manhattan Cable requested a waiver of this requirement on January 8, 1970, alleging, *inter alia*, the dominance of mass media in east central Kansas by WIBW-TV, and the expense to Manhattan Cable of installing a Community Antenna Relay Service (CARS) system to import the signals of KAKE-TV and Station KTVH (CBS, Channel 12), Hutchinson-Wichita, Kansas. According to Manhattan Cable, it and WIBW-TV reached an agreement, which led to the withdrawal of Manhattan Cable's petition and WIBW-TV's request. Nevertheless, notes Manhattan Cable, WIBW-TV renewed its request on March 27, 1980, subsequently withdrew this renewal on April 8, 1980, and yet again renewed its request for nonduplication protection on June 3, 1980. Manhattan Cable argues that WIBW-TV is dominant in the Kansas media market, being the licensee of several radio stations in Kansas and Oklahoma, and the owner and publisher of daily newspapers in several communities in Kansas, Oklahoma, Missouri, Nebraska, and South Dakota. Manhattan Cable denies that nonduplication protection is necessary for WIBW-TV's economic viability for the foregoing reasons, and further contends that WIBW-TV has survived for years without requesting such protection, despite a 14% increase in total television households in Kansas between 1960 and 1978.[3] Manhattan

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[2] The signals whose duplicating network programming Manhattan Cable would have to black out are Stations KCMO-TV (CBS, Channel 5) and KMBC-TV (ABC, Channel 9), both Kansas City, Missouri, and KAKE-TV (ABC, Channel 10), Wichita, Kansas.

[3] Manhattan Cable submits the following information from the *Television Factbook*, Services Volume, No. 48 (1979):

Cable argues that application of the rule will diminish competition in the marketplace, and will also disrupt long-established viewer habits. In addition, utilizing a formula from *Texas Community Antennas, Inc. d/b/a Nacogdoches Cable TV* (Nacogdoches, Texas), FCC 78–525, 68 FCC 2d 1271 (1978), Manhattan Cable estimates that grant of its requested waiver would cause an audience loss to WIBW-TV of at most 2.21% if granted to Manhattan Cable alone, or 5.38% on a marketwide basis.

3. In its opposition, filed July 15, 1980, WIBW-TV states that the licensees of the duplicating signals are themselves multiple media owners and are located over 110 miles from Manhattan, and that Manhattan Cable is itself owned by Communications Services, Inc., which owns several cable systems in Kansas, Louisiana, Texas, Missouri, and Oklahoma. WIBW-TV notes that Manhattan Cable does not claim to have been prejudiced by the withdrawal of WIBW-TV's earlier requests, and assures Manhattan Cable that the present request will not be withdrawn. WIBW-TV argues that ". . . duplication of the Topeka stations' programming at Manhattan has been the direct cause of the loss of Riley County from the Topeka ADI and DMA [Area of Dominant Influence and Designated Market Area, respectively] and the decline in Topeka's national market ranking." WIBW-TV states that Nielsen reallocated Riley County to the Kansas City DMA in November 1978 and reduced the Topeka market's ranking to 147 from 136, and that Arbitron has advised the station that it will similarly reallocate Riley County to the Kansas City ADI and reduce Topeka's market ranking to 144 from 135. These events, argues WIBW-TV, lowered the amount of national advertising dollars entering the Topeka market. WIBW-TV denies that it dominates area media, and cites *Stauffer Publications, Inc*, (Topeka, Kansas), FCC 76–470, 59 FCC 2d 836 (1976), for the proposition that in fact WIBW-TV's holdings have furthered diversity in Topeka. In any event, claims WIBW-TV, the provision of nonduplication protection does not meaningfully decrease diversity, as it causes the loss of only distant commercial, promotional, and other announcements. WIBW-TV contends that Manhattan Cable's market analysis is insufficient, because the system submits no evidence concerning WIBW-TV's financial data, nor documents the claimed deprivation to cable subscribers, citing the *Third Report and Order in Docket No. 19995*, FCC 76–1076, 62 FCC 2d 99 (1976), *recon. granted*, FCC 78–217, 67 FCC 2d 1303 (1978), *stay granted in part*, FCC 78–331, 68 FCC 2d 1308 (1978), *recon. denied*, FCC 78–597, 68 FCC 2d 1461 (1978), *aff'd sub nom. Spartan Radiocasting Company v.*

	Total Households	*TV Households*	*Percent*
Spring 1960	675,300	568,540	84%
January 1978	829,400	809,200	98%

FCC, 619 F.2d 314 (4th Cir. 1980). WIBW-TV asserts that the 5.38% impact predicted by Manhattan Cable is significant, given the station's total survey audience (TSA) of only 24,000, and that Manhattan Cable's analysis ignores future system growth. Citing, *inter alia*, *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), and *Blytheville TV Cable Co.* (Blytheville, Arkansas), FCC 78-524, 68 FCC 2d 1065 (1978), WIBW-TV contends that Manhattan Cable has not met its burden of justifying waiver in this proceeding.[4]

4. Manhattan Cable replied to WIBW-TV on August 4, 1980. Manhattan Cable argues that its impact analysis was properly performed, and that cable growth in Riley County has long been stable. Manhattan Cable notes that WIBW-TV has never even provided a schedule of programs to be protected, as required by Section 76.94 of the Rules.[5] Manhattan Cable contends that WIBW-TV has not documented its assertions concerning ADI and DMA rankings, and submits Arbitron data to show that WIBW-TV's audience losses in Riley County have occurred only in non-CATV households.[6] Accordingly, argues Manhattan Cable, it is not duplicating programming carriage which is the cause of any difficulties which WIBW-TV may be experiencing in Riley County. In addition, notes Manhattan Cable, the signals WIBW-TV seeks to black out have also suffered viewing share declines in Riley County between 1978 and 1979. Manhattan Cable also contends that because WIBW-TV carries ABC programming only on a secondary basis, the shares

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[4] WIBW-TV notes that of 242 smaller market licensees reporting data for 1978, only 36 were not profitable, and over half of the profitable stations had profits in excess of $400,000, indicating that grant of Manhattan Cable's request might eviscerate the nonduplication rules.

[5] WIBW-TV concedes this in its opposition.

[6] *

Total Station Shares of County Viewing,
Riley Co., Kansas

	CATV Share 1978	*non-CATV Share 1978*	*CATV Share 1979*	*non-CATV Share 1979*
WIBW-TV	25	76	29	67
KTSB	20	16	19	15
Topeka Market Total Share	45	92	48	82
KCMO-TV	8	*	8	*
KMBC-TV	18	*	14	*
KAKE-TV	6	*	4	*
Total TV Households:		1978=17,100	1979=17,100	
CATV Households:		1978=13,800	1979=15,000	

* not submitted

received by KMBC-TV and KAKE-TV in Riley County show that cable carriage of these stations fills a void with desired programming. Manhattan Cable reiterates its earlier arguments concerning WIBW-TV's position in the Topeka market, and asserts that due to the lack of publicly available financial data for the Topeka market, WIBW-TV must come forward with this information to justify its claimed need for protection. Manhattan Cable claims that WIBW-TV's January 25, 1980 renewal application shows no programming addressed to Manhattan, Kansas, and notes that WIBW-TV has made no attempt to rebut Manhattan Cable's impact analyses.

Manhattan Cable and KTSB (CSC-238)

5. In support of its show cause petition, KTSB argues that it has properly notified Manhattan Cable of the station's schedule and nonduplication requests, but that Manhattan Cable has not afforded KTSB the requested protection.[7] KTSB contends that Manhattan Cable had previously failed to provide requested protection, which led KTSB to file an earlier show cause petition. This petition was withdrawn upon an agreement between KTSB and Manhattan Cable in 1969, a copy of which KTSB submits, which provided that Manhattan Cable would afford KTSB same-day nonduplication protection. KTSB contends that Manhattan Cable has breached this agreement by not blacking out WDAF-TV's signal, and references WIBW-TV's pleadings (*see* paragraph 3, *supra*).[8]

6. Manhattan Cable opposed KTSB's show cause petition on October 24, 1980. Manhattan Cable contends that it is only on its Manhattan, Kansas system that KTSB legitimately seeks protection. Nevertheless, according to Manhattan, KTSB's notifications are confusing, insufficiently specific, and defective under the Commission's rules.[9] Manhattan Cable claims that the parties involved have not relied on the 1969 agreement since the early 1970s, and the agreement itself has been rendered obsolete by 1972 and 1975 rule changes, which now require only simultaneous protection rather than same-day protection. Manhattan Cable notes that while KTSB relies on WIBW-TV's pleadings, KTSB ignores Manhattan Cable's reply, and may be acting in concert with WIBW-TV to pressure Manhattan Cable.

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[7] KTSB submits an affidavit from its regional sales manager attesting to the fact that on August 19, 1980, between 12:00 p.m. and 1:00 p.m., Manhattan Cable carried duplicating programming from Station WDAF-TV (NBC, Channel 4), Kansas City, Missouri.

[8] On October 16, 1980, KTSB filed a supplement to its petition, echoing WIBW-TV's concerns over market rankings.

[9] Manhattan Cable contends that the representative notification submitted by KTSB does not identify the stations to be deleted; the programming to be deleted; the network affected; nor the day, date, and end times of programming to be deleted.

7. Concurrently with its opposition, Manhattan Cable filed a petition for special relief against KTSB's nonduplication protection request. Manhattan Cable reiterates the sequence of events leading to the filing of KTSB's show cause petition, and summarizes the opposition thereto which Manhattan Cable filed. Manhattan Cable notes that KTSB has not received nonduplication protection against WDAF-TV since the early 1970s, and yet there have been no indications of threats to KTSB's economic viability. To the contrary, Manhattan Cable contends that ". . . television broadcasting is a healthy and expanding industry in Topeka." Manhattan Cable cites data released and submitted in conjunction with a petition to deny filed by KTSB against an application for a semi-satellite station on Channel 43 in Topeka in 1976,[10] noting that combined financial data for KTSB, WIBW-TV, and Station KQTV (ABC, Channel 2), St. Joseph, Missouri, show total revenues increasing from $3,945,672 in 1973 to $4,701,300 in 1975, and that income after expenses in 1975 was $131,885. Manhattan Cable also submits excerpts from a study by Roger Cooper & Associates submitted in 1976 by KTSB, which projects that by 1982 or 1983 the Topeka market could support three equal-facility television stations. In addition, Manhattan Cable submits an affidavit and study from Horace W. Gross, president of a television and radio management consulting firm, which projects that marketplace forces themselves would cause a new UHF station in the Topeka market to lose substantial sums of money for several years, although the market generally evidences growth potential. Manhattan Cable further notes that KTSB stated that its cash flow approached the break even point in 1975, and that the opposition to KTSB's petition to deny noted the growth potential of the Topeka market. Manhattan Cable argues that total cable subscribership levels in the market have changed little between 1976 and 1979, and contends that an impact analysis based on *Texas Community Antennas, Inc.*, *supra*, indicates an estimated impact on KTSB of at most 2.49% if Manhattan Cable's waiver is granted to it alone, or 6.03% on a marketwide basis.

8. KTSB filed its "Reply" to Manhattan Cable's opposition in the show cause proceeding on November 13, 1980. KTSB argues that it has established its right to the requested protection, and that in fact its notifications have been clear and sufficient. Moreover, citing the *Memorandum Opinion and Order in Docket Nos. 19995 and 18785*, FCC 75–1143, 56 FCC 2d 210, 227 (1975); *Carthage Cablevision, Inc.* (Carthage, Missouri), FCC 77–247, 64 FCC 2d 545 (1977); and *Cable TV of Durango, Inc.* (Durango, Colorado), FCC 77–462, 65 FCC 2d 415 (1977), KTSB contends that Manhattan Cable has not been entitled to keep its objections to itself while ignoring KTSB's notifications.

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[10] Manhattan Cable notes, as it did in its earlier pleadings, the lack of publicly available financial data for the Topeka market (*see* paragraph 4, *supra*).

KTSB contends that the 1969 agreement remains valid by its own terms unless sixty days prior written notice is given by any party to all other parties, and that therefore the agreement is enforceable pursuant to Section 76.95(d) of the Rules.

9. KTSB opposed Manhattan Cable's waiver petition on November 24, 1980. KTSB claims that Manhattan Cable has failed to meet its burden of proof in this matter, citing *Arlington Telecommunications Corporation d/b/a ARTEC* (Arlington County, Virginia), FCC 77–561, 65 FCC 2d 469 (1977), *aff'd in part*, FCC 78–781, 69 FCC 2d 1923 (1978), *aff'd on recon.*, FCC 79–73, 70 FCC 2d 2291 (1979), *stay denied*, FCC 79–487, 73 FCC 2d 766 (1979), *appeal dismissed sub nom. The Committee to Balance the Impact Gaff and to Make ARTEC Constitutional* v. *FCC*, No. 79–1303 (D.C. Cir. Feb. 5, 1982), and therefore KTSB refuses to place its finances in issue unless the Commission finds that Manhattan Cable has made a *prima facie* case for waiver of Section 76.92 of the Rules. KTSB denies that the Topeka market is economically healthy, reiterating its prior contentions concerning Arbitron market rankings (*see* paragraph 3, *supra*), and claiming that Manhattan Cable's financial data are outdated. KTSB states that "Arbitron's records reflect KTSB's claims to nonduplication protection," and therefore the lack of protection has never been accurately reflected. KTSB challenges Manhattan Cable's projections of slow cable expansion in the Topeka market, contending that Manhattan Cable has ignored certain systems in its analysis. In addition, KTSB argues that Manhattan Cable's analysis does not use the most recently available information. Accordingly, KTSB argues that a proper impact analysis would reveal a current 12% audience loss to KTSB, and a potential 20.6% loss.[11] Citing *Cablecom-General, Inc.* (Gulfport, Mississippi), FCC 79–200, 71 FCC 2d 434 (1979), and *Texas Community Antennas, Inc.*, *supra*, KTSB contends that these figures are too great to permit waiver. KTSB asserts that its requests for protection and notifications to Manhattan Cable have been properly made and are fully detailed, and that therefore Manhattan Cable's petition for waiver is untimely. KTSB argues that Manhattan Cable is attempting to manipulate the Commission's Rules to avoid its obligations, and urges swift action in this proceeding.

10. Manhattan Cable replied to KTSB on December 15, 1980. Manhattan Cable notes that KTSB challenges only the data used by Manhattan Cable in its impact analyses, and not the analyses' methodology. Manhattan Cable contends that in fact it included more systems than necessary in its analyses, and that its exclusions

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[11] KTSB, however, appears to obtain these projected audience loss figures by including more systems in its analysis than appropriate, and by not including a factor reflecting the amount of KTSB's programming which might be subject to duplication. *See* Appendix.

were legitimate based on WDAF-TV's status as significantly viewed in certain counties,[12] and that current subscriber levels are the proper figures to be used. Accordingly, argues Manhattan Cable, actual projected impact to KTSB should be only 3.98%. Moreover, asserts Manhattan Cable, if KTSB has been credited with protection by Arbitron, the reallocation of Riley County from the Topeka ADI to the Kansas City ADI is irrelevant to the question of nonduplication protection. Manhattan Cable reiterates its contentions that KTSB's notifications have been deficient, and claims that it promptly sought waiver once it became aware that KTSB intended to rely on these notifications. Manhattan Cable claims that KTSB has not demonstrated that the 1969 agreement was extended, nor that it has not been superseded by subsequent rule changes. Manhattan Cable contends that the data it submits establish a *prima facie* case for waiver, which KTSB has failed to rebut.

Discussion

11. Before turning to Manhattan Cable's formal waiver request, there are certain preliminary issues that must be addressed. "We have repeatedly stated that for our nonduplication rules . . . to function as intended, we must expect a high degree of good faith and cooperation between the cable operators and broadcasters." *Colonial Cablevision of Revere, Inc., et al.*, FCC 80–7, 76 FCC 2d 56, 60 (1980) (footnote omitted). *See also Cable TV of Durango, Inc.* (Durango, Colorado), FCC 77–462, 65 FCC 2d 415, 419 (1977); *Carthage Cablevision, Inc.* (Carthage, Missouri), FCC 77–247, 64 FCC 2d 545, 547 (1977). The fact that KTSB's notices may have been slightly deficient, or may in some ways have been overinclusive, did not render them inoperative, and Manhattan Cable cannot rely on such factors to avoid its legitimate obligations pursuant to our rules.[13] *See Colonial Cablevision of Revere, Inc.*, 76 FCC 2d at 59–60. With respect to the 1969 agreement between the parties, the Commission has previously noted that substantive changes in the nonduplication rules, such as those adopted in 1975 and 1978, could render agreements such as the one at issue herein contrary to the public interest. *Telecable Associates, Inc., et al.*, Mimeo No. 2885, 51 RR 2d 147 (1982); *Liberty Television, Inc. d/b/a Corvallis TV Cable Co.* (Corvallis, Oregon), FCC 81–495, 88 FCC 2d 52 (1981). This agreement repeatedly refers to Section 74.1103 of the Rules and same-day nonduplication protection. It is not in the public interest in view of the fact that the 1972 rules superseded the rules referred to in the 1969 agreement and the Commission's determination therein that,

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[12] Pursuant to Section 76.92(g) of the Rules, significantly viewed signals are exempt from nonduplication blackouts.

[13] In fact, Manhattan Cable was apparently able to understand its obligations without difficulty, as evidenced by its arguments in opposition to KTSB's petition.

absent a showing by the local station, simultaneous protection is sufficient to protect the local station. In view of the foregoing, and in view of our resolution below of Manhattan Cable's petitions for waiver, we do not believe that issuance of an order to show cause as requested by KTSB is appropriate or in the public interest.

12. In order to obtain a waiver of the network nonduplication rules, a petitioner must submit specific evidence demonstrating adverse economic impact on the cable system as a consequence of compliance or, conversely, evidence demonstrating through a similarly specific factual showing that waiver will not adversely impact the broadcaster seeking protection. *See Texas Community Antennas, Inc.*, 68 FCC 2d at 1279–80. Manhattan Cable has submitted showings, based on a Commission formula, which Manhattan Cable contends demonstrate that grant of its requested waiver, even on a marketwide basis, will not significantly impact WIBW-TV and KTSB adversely. While both stations criticize Manhattan Cable's analyses (*see* paragraphs 3 and 9, *supra*), these criticisms are generally without merit. Manhattan Cable's exclusions are legitimate, and we note that the Commission has not required petitioners submitting impact analyses to estimate the future growth potential of mature systems. *E.g., Palm Beach Cable Television Co.* (North Palm Beach, Florida), FCC 80–301, 78 FCC 2d 1180, 1184 n. 6 (1980). While Manhattan Cable's analyses do utilize 1979 data, this was the most recently available data at the time its pleadings were filed. Nevertheless, a marketwide analysis by Commission staff utilizing more recent data and accounting for the specific number of signals and percentage of programming to be protected reveals that potential impact resulting from grant of the requested waivers would only be 3.16% on KTSB and 2.54% on WIBW-TV.[14] In addition we note that neither WIBW-TV nor KTSB have established any nexus between Riley County's ADI shift and the presence or lack of nonduplication protection.[15] In addition, neither WIBW-TV nor KTSB has attempted to show with specific factual data that its financial condition is such that the anticipated losses of revenue would adversely affect the public interest. KTSB submits that the Commission should not seek such a specific factual showing until it has concluded that petitioner has *prima facie* demonstrated a lack of adverse impact upon the broadcaster seeking network nonduplication protection. We are not persuaded that the incremental two-step procedures alluded to by KTSB (*see* paragraph 9, *supra*), which were first used nearly six years ago with respect to waivers of the then distant television signal carriage rules, should be followed herein or in future network nonduplication protection waiver requests involving

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[14] *See* Appendix.

[15] In fact, for 1981–82, Arbitron has reassigned Riley County to the Topeka ADI.

impact analyses. Those earlier *ARTEC* procedures were burdensome and costly both to the parties involved and to the Commission and its processes. They were also highly litigious, often unnecessarily prolonging the Commission's ultimate resolution of the requested waiver. Moreover, the Commission's disposition of numerous *ARTEC* cases since the institution of these procedures several years ago has established our expertise in this form of analysis, and such widespread precedent has afforded potential petitioners and objectors a sufficient basis for knowledge of the showings necessary for such an analysis. In view thereof, we must decline to apply such inefficient procedures to our processing of waiver requests such as these. Once petitioner has made its showing of potential impact, it will then be incumbent upon any opposing station claiming adverse impact to submit in its opposition pleadings a specific showing, supported by specific factual data (1) as to the station's financial condition, and (2) that the station's anticipated losses of revenue would adversely affect the public interest in light of the station's condition.[16] Based on an analysis of the impact evidence submitted, it is evident that grant of the waivers requested by Manhattan Cable will not impair WIBW-TV's and KTSB's ability to operate in the public interest.

13. In view of the foregoing, we find that grant of the waivers requested by Manhattan Cable is in the public interest.

14. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-1786) filed June 19, 1980, by Manhattan Cable TV Service, Inc. IS GRANTED.

15. IT IS FURTHER ORDERED, That the "Petition for Order to Show Cause" (CSC-238) filed September 24, 1980, by Studio Broadcasting System Division of Highwood Service, Inc. IS DENIED.

16. IT IS FURTHER ORDERED, That the petition for special relief filed October 24, 1980, by Manhattan Cable TV Service, Inc. IS GRANTED

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix

The following is a staff analysis of the potential marketwide impact of exempting Manhattan Cable and all similarly situated cable systems from the network nonduplication rules on the audiences of Topeka television stations WIBW-TV and KTSB. This study uses an audience impact formula based on that found in *Texas Community Antennas, Inc. d/b/a Nacogdoches Cable TV* (Nacogdoches, Texas), FCC 78-525, 68 FCC 2d 1271, 1282-83 (1978):

$$\text{Audience Division} = \frac{(1) \times (2) \times (3) \times (4) \times (5)}{(6)}$$

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[16] We caution interested parties, however, that all pertinent information available should be presented at this time. Pursuant to Section 1.106(b)(3) of the Rules, petitions for reconsideration which do not rely upon new facts or changed circumstances are subject to dismissal.

where,

(1) = the number of cable subscribers to the petitioning and similarly situated systems as applicable (Source: *Television Factbook*, Services Volume 50, 1981–1982);

(2) = the percentage of homes using television in the market (HUT or market rating) during the 9 AM to Midnight period. (Source: Arbitron, *Day-Part Audience Estimates Summary*, February 1982);

(3) = percentage share of cable viewing received by the local station during the 9 AM—Midnight period (Source: Arbitron, *County Coverage Survey*, CATV-controlled, 1982 [when available];

(4) = percentage of local station's programming currently protected against distant duplicative programming;

(5) = fractionalization factor which represents the expected percentage of audience diversion from the local station; and

(6) = local station's average 9 AM to Midnight audience (Source: Arbitron, *Day-Part Audience Estimates Summary* February 1982).

Systems included in the staff analysis and the subscriber counts which constitute factor (1) where appropriate are as follows:

			Station to be Blacked Out Against:	
System	*County*	*Subscribers*	*KTSB*	*WIBW-TV*
Emporia	**Lyon**	**7,250**	**WDAF-TV, KARD-TV**	**KCMO-TV, KTVH, KMBC-TV, KAKE-TV**
Lawrence	**Douglas**	**9,797**		**KQTV**
Manhattan	**Riley**	**10,800**	**WDAF-TV**	**KCMO-TV, KMBC-TV, KAKE-TV**
Ottawa	**Franklin**	**2,430**	**KOAM-TV**	**KQTV**
Paola	**Miami**	**1,130**	**KOAM-TV**	**KQTV**
Topeka	**Shawnee**	**25,279**		**KQTV**

Factor (4) represents the percentage of each local station's network programming which might be subject to duplication. Since individual affiliates carry varying percentages of the network originated programming and sometimes alter their schedules from that of the network feeds, a program by program comparison of the schedules of the various stations must be implemented to determine this value. Using the schedules as they appear in Arbitron's February 1981 *Market Summary* books and the combinations of appropriate duplicating signals as listed above, the following values will be used for factor (4) in the calculation of expected impact:

Local Signal	*Duplicating Signal(s)*	*% Duplication*
KTSB	**WDAF-TV, KARD-TV**	**41% both; 13% one**
	WDAF-TV	**53%**
	KOAM-TV	**42%**
WIBW-TV	**KCMO-TV, KTVH, KMBC-TV, KAKE-TV**	**21% two; 35% one**
	KQTV	**11%**
	KCMO-TV, KMBC-TV, KAKE-TV	**11% two; 35% one**

The fractionalization factor (5) is an estimate of the audience which will be lost to duplicating signals. If there is one such signal, it is assumed that 50% of the local station's audience will be diverted since a viewer is equally likely to choose the local or

the distant station for the identical show. If there are two duplicating signals the fractionalization factor is estimated to be 67% since 2 of the 3 possible sources of the program are distant. In general this factor is the number of distant duplicating signals divided by the total number of stations broadcasting the same program.

Calculation of Impact:

KTSB

Emporia	7,250 ×	.37 ×	.16 ×	.49 ×	.67
	7,250 ×	.37 ×	.16 ×	.07 ×	.50
Manhattan	10,800 ×	.37 ×	.19 ×	.55 ×	.50
Ottawa	2,430 ×	.37 ×	.06 ×	.46 ×	.50
Paola	1,130 ×	.37 ×	.02 ×	.46 ×	.50

12,000

= 3.16%

WIBW-TV

Emporia	7,250 ×	.37 ×	.25 ×	.50 ×	.67
	7,250 ×	.37 ×	.25 ×	.13 ×	.50
Lawrence	9,797 ×	.37 ×	.06 ×	.06 ×	.50
Manhattan	10,800 ×	.37 ×	.24 ×	.47 ×	.50
	10,800 ×	.37 ×	.24 ×	.06 ×	.67
Ottawa	2,430 ×	.37 ×	.11 ×	.06 ×	.50
Paola	1,130 ×	.37 ×	.01 ×	.06 ×	.50
Topeka	25,279 ×	.37 ×	.24 ×	.06 ×	.50

24,000

= 2.54%

Coast Station
Maritime Mobile Service
Ship, Station

Parts 2, 81 and 83 amended to provide facsimile communications between coast stations and ship stations in the HF band.
–*Maritime Facsimile Service*
PR Docket No. 83–90

FCC 83–418

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
Amendment of Parts 2, 81 and 83 to provide for facsimile communications in the maritime mobile service.

PR Docket No. 83–90

REPORT AND ORDER
(PROCEEDING TERMINATED)

(Adopted: September 13, 1983; Released: September 30, 1983)

BY THE COMMISSION:

Introduction

1. In the Notice of Proposed Rule Making (NPRM)[1] we proposed to provide for facsimile communications between coast stations and vessels on the high seas by the use of high frequencies (3–30 MHz).

2. Three comments were filed in response to the NPRM by the following organizations:

- The American Telephone and Telegraph Company (AT&T);
- Mobile Marine Radio, Inc. (MMR); and
- WJG Telephone Company, Inc. (WJG).

3. No comments were filed by shipping companies operating vessels transiting the high seas or by manufacturers of facsimile equipment.

4. All three commenters supported the proposal to make facsimile service available to high seas vessels. The commenters opposed inclusion in the rules of technical standards for facsimile equipment. AT&T suggests that all non-voice applications be permitted on the

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[1] PR Docket No. 83–90, FCC 83–58, released March 3, 1983, 48 FR 9890.

facsimile frequencies. MMR suggests that voice be permitted on the facsimile frequencies for set-up purposes. WJG suggests that specific frequencies not be set aside exclusively for facsimile but that frequencies suitable for telephony be opened up for facsimile as well. AT&T and MMR supported the proposal that coast station frequencies be taken from the shared bands.

Technical Standards

5. In the NPRM we proposed to add one section each to Parts 81 and 83 (§81.144 and 83.147) to specify technical standards for facsimile equipment used at coast stations and aboard ship. The three commenters opposed adoption of these standards. There were no supporting comments in favor of the proposed standards. In view of the comments, we conclude that it is unnecessary to adopt detailed equipment standards beyond spectrum characteristics (e.g., emission, power, bandwidth and frequency tolerence). Facsimile communication will primarily be between vessels and shore facilities of the vessel operator, thus assuring equipment compatibility. Further, the absence of detailed standards will provide for maximum user flexibility and encourage innovation. We, therefore, are not adopting the two sections (§81.144 and 83.147) proposed in the NPRM.

6. To present the immediate licensing of ship and coast stations for fascimile in the 3–30 MHz frequency band, we will permit stations using single sideband transmitters capable of suppressed carrier (A3J) emission to transmit facsimile (A4J) emission if such transmitters were type accepted before October 1, 1983, provided that there are no modifications to the equipment and that it continues to comply with the technical standards in the rules. Transmitters type accepted after October 1, 1983, that are to be used for facsimile must demonstrate that the equipment is capable of transmitting with A4J or F4 emission. Transmitters type accepted after October 1, 1983, for facsimile (A4J or F4) will have the emission designator listed on the equipment authorization grant. Manufacturers who wish to have the A4J or F4 emission designator added to the authorization grant of existing equipment may do so by filing a suitable request as described in Part 2.

Frequency Usage—Ship

7. The two families of frequencies (those between 4 and 27.5 MHz) proposed in the NPRM for ship station use are in bands allocated exclusively to the maritime mobile service. The usage to which these bands are available is specified in the ITU Radio Regulations as: "Frequencies assignable to ship stations for wideband telegraphy, facsimile and special transmission systems".

8. AT&T suggests that the scope of usage on the proposed frequencies be expanded to include other non-voice services such as data and slow-scan television. While these usages are clearly within

the limits prescribed by the ITU Radio Regulations as quoted above, they are outside the scope of this proceeding and are not being treated herein.

9. MMR suggested that the use of voice be permitted on ship station facsimile frequencies to facilitate the set-up of facsimile transmissions. If this is not done, MMR states, it will be necessary to use a second voice channel to coordinate successful transmission of facsimile. In the absence of common technical standards at coast and ship station, and the probability that different systems will be used at the two terminals, we agree that some means of coordinating satisfactory reception of the facsimile transmission will be necessary. We are, therefore, authorizing secondary use of voice on the facsimile frequencies for the sole purpose of set-up and confirmation of receipt of facsimile transmissions.

10. We stress that only two families of frequencies are available for facsimile use by all ship stations and that these will be available for reception at all coast stations. The coast station licensee will, therefore, assure that once the facsimile transmission is complete, the use of voice on the facsimile frequencies will be discontinued.

11. WJG suggests that frequencies not be set aside exclusively for facsimile, but that frequencies suitable for telephony be opened up for facsimile as well. Basically, WJG's proposal is that all telephony channels be made available for facsimile. WJG's suggestion is beyond the scope of this proceeding and it is not, therefore, being treated herein.

Frequency Usage—Coast

12. In the NPRM we set forth two types of allocations which coast stations might use to communicate with facsimile fitted ship stations. One was frequencies in the coast telegraph bands, which was viewed as improbable because of the use of those bands for Al Morse radiotelegraphy. The other was frequencies in shared bands between 3 and 320 MHz, available to one or more other radio services including the maritime mobile service. In their comments AT&T and MMR supported coast station use of frequencies in the shared bands. We are adopting provisions to implement this option.[2] These shared bands are available to coast stations and may be used to provide facsimile services.

13. In their comments AT&T suggests that the coast frequencies use be expanded to include all non-voice applications. In the Appendix to the NPRM we proposed (in §83.332) that ship station facsimile frequencies be limited to facsimile. We did not, however, include in our proposals for Part 81 that the coast station frequencies be similarly limited. There are no national or international

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[2] Docket 80–739, Implementation of the Final Act of the World Adminstrative Radio Conference 1979 develops provisions for shared bands at high frequencies.

limitations on the type of traffic which may be handled by coast stations on frequencies in the shared bands and we are not adopting limitations in this proceeding. Coast stations may, when authorized, handle all non-voice applications on frequencies in these shared bands.

14. Similarly, in regard to MMR's expressed need to employ voice on coast station frequencies to set-up facsimile, the same absence of limitations is applicable to coast station use, when authorized, of frequencies in the shared bands.

Other Matters

15. AT&T suggests the Commission conduct a study to determine the current use of frequencies which are assigned and registered for Al Morse radiotelegraphy. This suggestion arises from the premise that the more sophisticated telex service may have reduced the traffic in the coast telegraph bands making exclusive channel assignments feasible to other users. AT&T expresses the view that it appears prudent to determine whether additional circuits could be made available from the spectrum now assigned to Al Morse radiotelegraphy. A general review of all maritime mobile HF bands will be made at the World Administrative Radio Conference for the Mobile Services scheduled for 1987.[3] In preparation of U.S. proposals for this conference a study will be made as suggested by AT&T of the current use of Al Morse frequencies.

16. For the reasons indicated above, we conclude that the amendments set forth in the attached Appendix are in the public interest. Therefore, we are amending Parts 2, 81 and 83 as set forth in the attached Appendix.

17. The rule amendments adopted in this proceeding will provide for facsimile communications in the maritime mobile service. The communications offered by public coast stations and available to ships at sea will be expanded by the addition of facsimile. However, no additional equipment or expanded service would be mandated by these rules. Therefore the Commission has determined that Sections 603 and 604 of the Regulatory Flexibility Act of 1980 (Pub. L. 96–354) do not apply to this rule making proceeding, because the rule will not, if promulgated, have significant economic impact on a substantial number of small entities.

18. Regarding questions on matters covered in this document contact Charles D. Fisher (202)632–7175.

19. Accordingly, IT IS ORDERED, That under the authority contained in Section 4(i) and 303(b), (c), (e), (g) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. 145(i) and

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[3] See Final Acts of the WARC for Mobile Services, Geneva, Feb/Mar 1983; Resolution No. COM 4/6, and Public Notice July 13, 1983, mimeo 5295, "Staff Report to the Commission on the results of the 1983 WARC for the Mobile Services."

303(b), (c), (e), (g) and (r), the Commission's rules ARE AMENDED as forth in the attached Appendix, effective October 24, 1983.

20. IT IS FURTHER ORDERED, That the proceeding IS TERMINATED.

21. IT IS FURTHER ORDERED, That a copy of this Report and Order shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

Parts 2, 81 and 83 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

A. Part 2—Frequency Allocations and Radio Treaty Matters; General Rule and Regulations.

1. In Section 2.106, the Table of Frequency Allocations, for the designated frequency bands between 2065 and 23000 kHz, column 7 is amended by adding the footnote designator US296; and under the heading "United States Footnotes" a new footnote US296 is added as follows:

§2.106 Table of Frequency Allocations.

FEDERAL COMMUNICATIONS COMMISSION

Band (kHz) 7	Service 8	Class of Station 9	Frequency 10	Nature of Service of Stations 11
*	*	*	*	*
2068.5-2078.5 (US296)	MARITIME MOBILE	Ship		Ship (wideband telegraphy, facsimile, special transmission systems).
*	*	*	*	*
4146.6-4162.5 (US296)	MARITIME MOBILE	Ship		Ship (wideband telegraphy, facsimile, and special transmission systems).
*	*	*	*	*
4166-4170 (US296)	MARITIME MOBILE	Ship	4168	Ship (wideband telegraphy, facsimile, and special transmission systems).
*	*	*	*	*
6224.6-6224.5 (US296)	MARITIME MOBILE	Ship		Ship (wideband telegraphy, facsimile, and special transmission

			systems).
*	*	*	* *
8300- 8328 (US296)	MARITIME MOBILE	Ship	Ship (wideband telegraphy, facsimile, and special transmission systems).
*	*	*	* *
8331.5- 8343.5 (US296)	MARITIME MOBILE	Ship	Ship (wideband telegraphy, facsimile, and special transmission systems).
*	*	*	* *
12483- 12491 (US296)	MARITIME MOBILE	Ship	Ship (wideband telegraphy, facsimile, and special transmission systems).
*	*	*	* *
16640- 16660 (US296)	MARITIME	Ship	Ship (wideband telegraphy, facsimile, and special transmission systems).
*	*	*	* *
22164- 22192 (US296)	MARITIME MOBILE		Ship (wideband telegraphy, facsimile, and, special transmission systems).
*	*	*	* *

United States Footnotes

* * * * *

US296 In the bands designated for Ship wideband telegraphy, facsimile and special transmission systems, the following assignable frequencies, are available to non-Government stations on a shared basis with Government stations: 2070.5, 2072.5, 2074.5, 2076.5, 4160.6, 4168, 6238.6, 6242.6, 8326, 8341.5, 12485, 12489, 16654, 16658, 22186 and 22190 kHz.

* * * * *

B. Part 81—Stations on Land in the Maritime Services and Alaska-Public Fixed Stations.

1. In Section 81.131, paragraphs (b)(2) and (b)(3) are amended by adding new emission designators, by changing the tolerance (last column) in paragraph (b)(3)(ii) from 20 to 15, and by removing footnote 1, to read as follows:

§81.131 Authorized frequency tolerance.

* * * * *

(b) ***

(2) From 1605 to 4000 kHz:

For A3A, A3H, A3J, A4J and F4 emissions .... 20 Hz

For other than A3A, A3H, A3J, A4J and F4 emissions 50

(3) From 4000 to 27,500 kHz:

(i) For A3A, A3B, A3H, A3J, A4J and F4 emissions .... 15 Hz

(ii) For narrow-band direct-printing telegraph and data transmission systems .... 15 Hz

(iii) For other than (i) and (ii) above .... 15 Hz

* * * * *

2. In Section 81.132, paragraph (a)(1) is amended and a new paragraph (g) is added, to read as follows:

§81.132 Authorized classes of emission.

(a) ***

Frequency band	*Classes of emission*
(1) Coast stations using telegraphy:	
14 to 160 kHz	**A1.**
160 to 490 kHz	**A1, A2 or A2H for distress, urgency and safety signals or any communications preceded by one of these signals.**
490 to 535 kHz	**A1 and A2 or A2H.**
2035 to 27,500 kHz	**A1 on frequencies listed in §81.206; F1 on frequencies listed in §81.204(c); only as authorized by the Commission on frequencies listed in §81.206; and F4 or A4J on frequencies referred to in §81.230.**

* * * * *

(g) For the purpose of this part A4J emission means facsimile transmitted by a suppressed carrier single sideband, carrier modulated with a frequency-shifted audio frequency subcarrier.

3. In Section 81.133, emissions F4 (2.8F4) and A4J (2.8 A4J) are added to the table of paragraph (a), to read as follows:

§81.133 Authorized bandwidth.

(a) ***

Classes of emission	*Emission designator*	*Authorized band width (kHz)*
A1	**0.16A1**	**0.4**
A2	**2.66A2**	**2.8**
A3	**6A3**	**8.0**
F1	**0.3F1[1]**	**0.5[1]**
F1	**16F1[2]**	**20[2]**
F3	**16F3[3]**	**20[3]**
F4	**16F4[4]**	**20[4]**

F4	2.8F4[5]	3.0[5]
P0	Variable	Variable
A3A	2.8A3A	3.0[6]
A3H	2.8A3H	3.0[6]
A3J	2.8A3J	3.0[6]
A4J	2.8A4J	3.0[5]

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[1] Narrow-band direct-printing telegraph and data transmission systems.
[2] Radioteletypewriter in the band 216-220 MHz.
[3] Applicable when maximum authorized frequency deviation is 5 kHz.
[4] Facsimile in the band 216-220 MHz.
[5] Facsimile in the band 2035 to 27,500 kHz.
[6] Transmitters type accepted prior to December 31, 1969, for emissions A3A, A3H, and A3J and an authorized bandwidth of 3.5 kHz may continue to be operated. These transmitters will not be authorized in new installations.

* * * * *

4. In Section 81.137, para (a) is amended and a new para (f) is added, to read as follows:

§81.137 Acceptability of transmitters for licensing

(a) Each radio telephone transmitter authorized in a Coast station, marine-utility, marine-fixed station, or Alaska-public fixed license (other than transmitters authorized solely for developmental stations and except as provided in paragraph (e) and (f) of this section) must be type accepted by the Commission. This requirement shall be applied as follows:

* * * * *

(f) Transmitters type accepted for single sideband suppressed carrier emission (A3J) prior to October 1, 1983, may be used for the transmission of facsimile (A4J emission) without filing for a type acceptance modification provided the equipment is not modified and continues to comply with the applicable technical standards in this part.

5. A new Section 81.230 is added to read as follows:

§81.230 Frequencies available for facsimile.

Frequencies in the bands 2035–27,500 kHz employed by coast stations for the purpose of providing facsimile communications with ship stations will be taken from those frequency bands listed in Part 2 which are available for shared use by the mobile service and other radio services.

C. Part 83—Stations on Shipboard in the Maritime Services.

1. In Section 83.131, subparagraphs (b)(4)(i), (b)(4)(ii), (b)(7)(iii) are amended to read as follows:

§83.131 Authorized frequency tolerance.

* * * * *

(b) ***

(4) Ship stations from 1605–2070 and 2080 to 3500 kHz:

(i) For transmitters using other than 200 A3A, A3H, A3J, A4J and F4 emissions, type accepted or type approved before November 30, 1977.

(ii) For transmitters using A3A, A3H, 50 Hz A3J, A4J, and F4 emissions, type accepted or type approved before November 30, 1977.

* * * * *

(7) Stations when using frequencies within the band 4000–27,500 kHz:

* * * * *

(iii) Ship stations using A3A, A3H, A3J, A4J or F4 emissions with transmitter type accepted or type approved:

(a) Before November 30, 1977 50 Hz

(b) After November 30, 1977 20 Hz

* * * * *

2. In Section 83.132, subparagraph (a)(1)(i) is amended and a new paragraph (g) is added, to read as follows:

§83.132 Authorized classes of emission.

* * * * *

(a) ***

Frequency band	***Classes of emission***
(1) Stations using radiotelegraphy:	
(i) 100 to 160 kHz	**A1.**
160 to 525 kHz	**A1 and A2 or A2H.**
2080 to 27,500 kHz	**A1, A4J or F4. Survival Craft stations may in addition use A2 or A2H.**
2070 to 2080	**A4J or F4. Wide-band telegraphy and special transmission systems. Manual International Morse code and telephony are excluded.**
1605 to 2080 kHz in Alaska	**A1.**

* * * * *

(g) For the purpose of this part, A4J emission means facsimile transmitted by suppressed carrier single sideband, carrier modulated with a frequency-shifted auto frequency subcarrier.

3. In Section 83.133, emissions F4 (2.8F4) and A4J (2.8 A4J) are added to the table of paragraph (a), to read as follows:

§83.133 Authorized bandwidth.

(a) ***

Classes of emission	***Emission designator***	***Authorized band-width width (kHz)***
A1	**0.16A1**	**0.4**
A2	**2.66A2**	**2.8**
A3	**6A3**	**8.0**
A9	**3.2A9[1]**	**25.0[1]**
F1	**0.3F1[2]**	**0.5[2]**
F1	**16F1[3]**	**20.0[3]**
F3	**16F3[4]**	**20.0[4]**
F4	**16F4[5]**	**20.0[5]**
F4	**2.8F4[6]**	**3.0[6]**

F9	14.4F9[1]	20.0[1]
F9	20,000F9[8]	20,000[8]
P0	Variable[8]	Variable[8]
A3A	2.8A3A	3.0[7]
A3H	2.8A3H	3.0[7]
A3J	2.8A3J	3.0[7]
A4J	2.8AJ	3.0[6]

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[1] Applicable only to emergency position-indicating radiobeacon stations.
[2] Narrow-band direct-printing telegraph and data transmission systems.
[3] Radioteletypewriter in the band 216-220 MHz.
[4] Applicable when maximum authorized frequency deviation is 5 kHz. See paragraph (c) of this section.
[5] Facsimile in the band 216-220 MHz.
[6] Facsimile within the band 2070 to 27,500 kHz.
[7] Transmitters type accepted prior to December 31, 1969, for emissions A3A, A3H, and A3J and an authorized bandwidth of 3.5 kHz may continue to be operated. These transmitters will not be authorized in new installations.
[8] Applicable to marine hand-held radars.

* * * * *

4. In Section 83.139, paragraph (a) is amended and a new paragraph (j) is added, to read as follows:

§83.139 Acceptability of transmitters for licensing

(a) Except as provided by paragraphs (c), (d), (f), (g) and (j) of this section, each radiotelephone transmitter authorized in a ship station or marine—utility station (other than transmitters authorized solely for developmental stations) must be type accepted by the Commission.

* * * * *

(j) Transmitters type accepted for single sideband suppressed carrier emission (A3J) prior to October 1, 1983, may be used for the transmission of facsimile (A4J emission) without filing for a type acceptance modification provided the equipment is not modified and continues to comply with the applicable technical standards in this part.

§83.324 [Amended]

5. In Section 83.324, paragraph (h) is removed.

6. A new Section 83.332 is added to read as follows:

§83.332 Assignable frequencies—Facsimile.

(a) Ship radiotelegraph working frequencies—facsimile—non-paired with coast station frequencies, for use in the bands between 2070 and 27,500 kHz are set forth in paragraph (b), below. The frequencies are available for use by radiotelegraph ship stations authorized to employ facsimile and are subject to the applicable provisions of Subpart E of this part.

(b) Ship transmit only:[1]

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[1] The use of voice on these frequencies is limited to set-up and confirmation of receipt of facsimile transmissions.

Family #1 (kHz)		*Family #2 (kHz)*	
Carrier	**Assigned**	**Carrier**	**Assigned**
2069.1	**2070.5**	**2071.1**	**2072.5**
2073.1	**2074.5**	**2075.1**	**2076.5**
4159.2	**4160.6**	**4166.6**	**4168**
6237.2	**6238.6**	**6241.2**	**6242.6**
8324.6	**8326**	**8340.1**	**8341.5**
12483.6	**12485**	**12487.6**	**12489**
16652.6	**16654**	**16656.6**	**16658**
22184.6	**22186**	**22188.6**	**22190**

Anti-trust
Multiple Ownership, See Ownership or Duopoly
Network Ownership of Stations
Ownership of Stations, Limitations on

Commission solicits comments on proposals designed to modify or eliminate its national broadcast station ownership limitation, the "seven station" rule.
–Multiple Ownership of B/c Stations
Gen. Docket No. 83–1009

FCC 83–440

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations.	Gen. Docket No. 83–1009

NOTICE OF PROPOSED RULE MAKING

(Adopted: September 22, 1983; Released: October 20, 1983)

BY THE COMMISSION: COMMISSIONER RIVERA DISSENTING AND ISSUING A STATEMENT.

1. The Commission, acting on its own motion, here proposes to modify that aspect of its multiple ownership rules commonly known as the "seven station rule." The rule prohibits any party from being a stockholder, officer or director or otherwise holding any interest in more than seven stations in the same broadcast service.[1] The dramatic changes in the communications marketplace during the three decades the rule has been in effect, as well as the increased programming diversity likely to result from its relaxation, suggest that this action is in order.

I. *Background*

A. *Early Ownership Restrictions.*

2. Although multiple ownership of stations had been a feature of

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[1] No more than five of the seven television stations may be VHF. The rule does not apply to noncommercial FM and television stations, but does limit noncommercial AM ownership. The full text of the rule as applied to each of the services is attached as Appendix "B".

the broadcast industry since its earliest days, it was not until the late 1930's that the Commission began to focus its attention on this aspect of industry organization.[2] The Commission's considerations came at a time when there was a significant expansion of Federal governmental activity and a corresponding lack of belief in the efficacy of the competitive marketplace.[3] An early target of Commission action was "duopoly," the term the Commission has applied to common ownership of more than one station in the same service in a particular community. In 1938, the Commission adopted a strong presumption against granting new licenses which would result in ownership duopolies.[4] This new policy was based in part on the value the Commission stated was being placed on "diversification of service," a concept which became a cornerstone of Commission ownership restrictions.[5]

3. When the Commission adopted rules governing the new commercial FM service in June, 1940, an absolute duopoly prohibition was included. Additionally, for the first time the Commission established a limit on the number of licenses which could be held under common control. The limit was six stations. The Commission subsequently stated that the purpose of the new rules was "[t]o obviate possible monopoly, and encourage local initiative."[6] In 1940

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[2] The Communications Act of 1934 is largely derived from the Radio Act of 1927. That statute was adopted in part due to the belief that Federal station licensing was necessary to prevent "monopolistic domination" in broadcasting. *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). The Commission has no authority to pass on antitrust violations as such. *United States v. Radio Corporation of America*, 358 U.S. 334, 343 (1959). It has, however, historically considered ownership concentration issues under the public interest standard. *See National Broadcasting Co., Inc. v. United States*, 319 U.S. 190, 222–224 (1943).

[3] See, for example, B.A. Lee, *The New Deal Reconsidered*, VI The Wilson Quarterly 62, 65–67 (1982).

[4] *Genesee Radio Corp.*, 5 F.C.C. 183 (1938).

[5] For the history of the early days of broadcasting, see generally E. Barnouw, *A Tower in Babel* (1966), *The Golden Web* (1968). For historical information on the multiple ownership issue, see generally H.H. Howard, *Multiple Broadcast Ownership: Regulatory History*, 27 Fed. Comm. B.J. 1 (1974); L.A. Powe, Jr., *FCC Determinations on Networking Issues in Multiple Ownership Proceedings* (Network Inquiry Special Staff Preliminary Report on Prospects for Additional Networks) (February, 1980); C.H. Sterling, *Television and Radio Broadcasting*, in B.M. Compaine, C.H. Sterling, T. Guback, and J.K. Noble, Jr., *Who Owns the Media*? 299–372 (2d ed. 1982) (hereinafter cited as *"Who Owns"*).

[6] Federal Communications Commission, *Sixth Annual Report* 68 (FY 1940) (1941). The FM "six station rule" placed a burden on the applicant to show that its proposed ownership of more than one station in that service "would foster competition . . . or provide a high frequency broadcasting service distinct and separate from existing services" and that such ownership would "not result in the concentration of control of high frequency broadcasting facilities in a manner inconsistent with the public interest, convenience and necessity." Ownership of six stations was stated to be merely the point at which the Commission would in any case consider that such a concentration of control existed. *Rules Governing High Frequency Broadcast Stations*, 5 Fed. Reg. 2382, 2384 (1940).

the Commission also promulgated similar rules for television, which was still being treated as an experimental service, but set the maximum number of stations which could be owned at three.[7] When rules authorizing television broadcasting as a regular commercial service were adopted in April, 1941, these restrictions were retained.[8] In May, 1944, the maximum number of television stations which could be controlled by one owner was increased to five in response to a National Broadcasting Co. ("NBC") petition.[9]

4. Two years later, the Commission established a *de facto* seven station limit for AM when it denied CBS' application to purchase an eighth such station, KQW in San Jose. The Commission asserted that concentration of control, "particularly in AM," was "not a factor of the absolute number of stations alone," but also depended on "the powers and frequencies of the stations." CBS already owned six 50,000-watt clear channel stations, as well as a 5,000-watt regional station.[10] While the decision indicated that the Commission would in AM matters consider all the factors involved in a given case, it in fact set a numerical line by which future Commission actions were measured.

5. The decision in the KQW case also reflected the ambivalence about network ownership of broadcast stations which has colored many subsequent Commission ownership deliberations. The *Report on Chain Broadcasting*, adopted in May, 1941, stated that if "the question were presented as an original matter at this time, the Commission might well reach the conclusion that the businesses of station operation and network operation should be entirely separated." However, given the existing ownership situation, the Commission determined that requiring divestiture was undesirable.[11] The Commission did include in its new "chain broadcasting regulations" provisions forbidding network ownership of more than one AM station in the same area as well as prohibitions on operation of more than one network by a single entity.[12] The Supreme Court

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[7] H.H. Howard, *supra* note 5, at 8.

[8] *Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284–2285 (1941). The Commission stated that it adopted a three station television ceiling rather than six as in FM because "the more limited television channels make three such stations the limit for the main television band." Federal Communications Commission, *Seventh Annual Report* 34 (FY 1941) (1941).

[9] *Rules Governing Broadcast Services Other Than Standard Broadcast*, 9 Fed. Reg. 5442 (1944). NBC did not get all that it had asked for, however, as it had requested that the figure be raised to seven. H.H. Howard, *supra* note 5, at 8.

[10] *Sherwood B. Brunton*, 11 F.C.C. 407, 413 (1946).

[11] *FCC Report on Chain Broadcasting* 67 (1941).

[12] *Id.*, at 92. The result of these requirements was to force NBC to divest itself of one of its two radio networks (which subsequently became ABC) and four owned-and-operated stations. H.H. Howard, *supra* note 5, at 8.

affirmed the Commission's promulgation of the chain broadcasting rules early in 1943.[13] As one commentator has observed, the Court's ruling came at "a time when there was a great urge to support the central government and the administrative process . . . a period in which it was unusual for the Supreme Court to conclude that an administrative law initiative was unauthorized, much less that the authorization was unconstitutional."[14] Several months later, the Commission concluded a rule making proceeding begun in 1941 and adopted a duopoly rule applicable to all AM licensees.[15]

6. Thus, by the mid-1940's, the Commission had established the broad outline of what were to be the basic elements of its ownership regulations for several decades. There were to be local and national ownership limitations—regional regulations would come later—with special attention sometimes given to the role of networks. The Commission had also established use of a pattern of analysis in which it generally merged its consideration of action necessary to prevent economic concentration, essentially an antitrust matter, with concerns regarding diversity of information sources, a First Amendment issue, and frequently utilized a relatively unsophisticated approach to these merged issues.

7. In 1947, Senator Wallace White, Chairman of the Committee on Interstate and Foreign Commerce, introduced legislation which would, *inter alia*, have barred the use of numerical national ownership ceilings, and substituted the limitation that no person could own or control stations "which in the aggregate provide a primary service . . . for more than 25 percentum of the population of the continental United States as determined in the last preceding decennial census."[16] The Commission opposed enactment of Senator White's proposal, arguing in part that it was "undesirable to attempt to write a single standard on multiple ownership which should

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[13] *National Broadcasting Co. v. United States, supra* note 2.

[14] M.E. Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation*, 31 Fed. Comm. L. J. 215, 220 (1978). The Court's approval of the Commission's action in the "chain broadcasting" case was based in part on a posited "scarcity" of the broadcast spectrum. *National Broadcasting Co., Inc. v. United States, supra* note 2, at 1008, 1011. The continuing validity of the "scarcity" rationale for regulation is questionable. See Part II, *infra*. See, also, for example, *Loveday v. FCC*, 707 F.2d 1443, 1458–1459 (D.C. Cir. 1983); D. L. Bazelon, *The First Amendment and the "New Media"—New Directions in Regulating Telecommunications*, 31 Fed. Comm. L.J. 201, 207 (1978). For a critique of the Court's reasoning in the NBC case, see W.E. Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media*, 32 Vand. L. Rev. 1249, 1315, 1322 (1979) (hereinafter "W.E. Lee, *Antitrust*").

[15] *Order No. 84-A—Multiple Ownership of Standard Broadcast Stations*, 8 Fed. Reg. 16065 (1943). In April, 1944, the Commission required divestiture of existing stations if necessary to comply with the new duopoly rule. *Order No. 84-B—Multiple Ownership of Standard Broadcast Stations*, 9 Fed. Reg. 3860 (1944).

[16] S. 1333, 80th Cong., 1st Sess. (1947).

govern all classes of service." It pointed out that it had not adopted an AM rule, and described the FM and TV rules as "tentative" and "[a]nyone who comes in and shows good reasons for changing it, up or down, will be given consideration."[17] The proposal was also opposed by representatives of the broadcast industry, who generally favored elimination of ownership limitations.

B. *The "Seven Station" Rule Making*

8. The White proposals were not reported out of committee. However, in August, 1948, the Commission initiated a proceeding which for the first time proposed formal restrictions on the number of AM stations under common control.[18] The number suggested for AM was seven, the KQW figure. No changes were proposed in the existing ceilings of six FM and five TV stations, but the Commission suggested allowing two minority non-controlling interests as a substitute for one controlling station holding. Thus, an individual would have been permitted non-controlling interests in up to 14 AM, 12 FM and 10 TV stations.[19] The *Notice* contemplated an effective date of January 1, 1953, to allow for the "orderly disposition of interests" in conflict with the rule.

9. One month after the Commission initiated the "seven station" proceeding, it established a "freeze" on the processing of new or pending applications for television station construction permits. The action was taken to allow the Commission time to revise the Table of Television Assignments, which had been adopted at the close of World War II. In early 1952, the Commission assigned VHF channels and channels in the new UHF band to various communities, and ended the "freeze" effective July 1. Thus, when the Commission took action in the "seven station" proceeding in November, 1953,

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[17] *To Amend the Communications Act of 1934: Hearings Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce on S. 1333*, 62–63, 70, 80th Cong., 1st Sess. (1947). The Commission also stated that on the basis of the 1940 Census, one person could have stations serving the entire population of 20 of the 22 states west of the Mississippi under the 25 percent rule. Even in the more populous East, one individual "could own stations serving virtually all of New England and the Middle Atlantic States." It believed that such a provision was therefore "not conducive to the prevention of monopoly."

[18] *Amendment of Sections 3.35, 3.240, and 3.636 of the Rules and Regulations Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 13 Fed. Reg. 5060 (1948).

[19] Additionally, the language of the proposed rule eliminated the presumption against ownership of more than one station embodied in the existing FM and TV rules. In its stead the *Notice* proposed that in determining whether ownership of stations below the limit constituted a concentration of control, the Commission would on a case-by-case basis consider "such factors as the size, extent and location of areas served, the number of people served, classes of stations involved, and the extent of other competitive service to the areas in question."

television was on the edge of enormous expansion but relatively few stations were as yet operational.[20] The Commission's *Order* adopted the limits of seven AM and five TV stations as proposed. The AM limit was kept at seven, the Commission said, so that the existing holdings of such stations would not be "unduly disrupted." The Commission found that a seven station limit was "consistent with the historical development of AM broadcasting and the tremendous expansion that has been achieved almost entirely within the framework of that limitation." The six station FM rule was stated to have been raised to AM's level of seven "because of their interrelationship and the present status of FM's growth."[21] The TV limit was maintained at five because in the Commission's "judgment based on extensive experience with the problems of multiple ownership," it had "proven practicable and desirable."

10. In adopting the "seven station rule," the Commission acknowledged the arguments by some parties that the proposed rules were arbitrary because they did not take into account "class and size of stations, geographical locations, populations served, and similar factors." Because of these adverse comments, it had "considered alternatives to the outstanding proposal." However, it had determined as a result of a study of existing multiple ownership that "any proposal to limit multiple ownership on the basis of such factors as class of station or geographic location" was "either unsatisfactory or unworkable." A formula which would "reasonably limit ownership on such basis" would have required extensive divestiture by existing licensees. Any formula which allowed existing licensees to maintain their holdings would, the Commission commented, "substantially extend the present maximum limitation on station ownership—a result felt to be completely unwarranted in view of the important policy considerations involved."[22] Any new formula which would resolve that problem by "grandfathering" existing interests was viewed as providing "unfair preferential treatment" to existing multiple owners. Thus, the Commission concluded that the numerical type of limitation it has proposed was "the only sound and workable" regulatory method "because of the history and present development of the broadcast industry."[23]

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[20] *Amendment of Section 3.606 of the Commission's Rules and Regulations*, 41 F.C.C. 148 (1952); Federal Communications Commission, *19th Annual Report* 110–112 (FY 1953) (1954); *Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcasting Stations*, 18 F.C.C. 288 (1953). Comments had been due on September 27, 1948. Oral argument was held on January 17, 1949.

[21] The Commission noted that as of January, 1953, 538 of the 600 existing FM stations were owned by AM licensees "and for the most part, duplicate the AM programming."

[22] Only two licensees, CBS and J. Elroy McCaw, appear to have held interests in excess of those permitted under the new rule. They were given three years to divest. H.H. Howard, *supra* note 5, at 15.

11. The Commission said that it had historically acted to further "diversification" of broadcast ownership in order to "implement the Congressional policy against monopoly" seen as underlying adoption of the Communications Act and "in order to preserve competition." The "principle" of "diversification", it stated, required a limit on the number of stations "which may be licensed to any person or persons under common control." The Commission said that the vitality of the system of broadcasting depended on a group of diversified licensees "prepared and qualified to serve the varied and divergent needs of the public for radio service." Thus, the fundamental purpose of its new national ownership rules was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue concentration of economic power contrary to the public interest."[24] [25] The Commission decided that the *Notice* proposal to equate two minority noncontrolling interests with one controlling interest would not be implemented. It stated that while the holder of a minority interest might have only slight influence on station operations, it also appeared that such an individual might exert considerable influence not directly correlated with the size of his holdings.[26]

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[23] The new rule did state, as had its predecessors, that in determining whether a concentration of control existed, the Commission would on a case-by-case basis consider such factors as "the size, extent and location of areas served, the number of people served, classes of stations involved [radio only], and the extent of other competitive services to the area in question." Ownership in excess of the station ceiling was only the case in which the Commission would "in any event" consider that a concentration of control existed. However, it appears that no acquisition within the numerical national limit had then been or was ever prevented because of concerns regarding national ownership concentration. L.A. Powe, Jr., *supra* note 5, at 49. The reference to "size . . . of areas served" and related factors was deleted from the rule without specific explanation in 1977, in the proceeding adopting the present rule regarding regional ownership limits. The regional ownership rule was adopted in large part to eliminate case-by-case consideration of issues related to "regional concentration of control." *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 63 F.C.C. 2d 824, 825–826, 830–831 (1977).

[24] *Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcast Stations*, *supra* note 20, at 292–293.

[25] The Commission rejected arguments that its actions were really improper attempts to enforce the antitrust laws, a responsibility entrusted by Congress to the Justice Department, and the Federal Trade Commission. Rather, the Commission stated, its actions were designed to implement the Congressional policy against monopoly it saw as embodied in the Communications Act.

[26] The Commission stated that opposition to its proposal to consider the interests of non-shareholder officers and directors of licensees and applicants ignored the realities of business organization and control. It observed that "[i]n numerous business organizations the actual day to day control is in the hands of officers and directors who are not necessarily owners or stockholders." The Commission believed it was reasonable and necessary to "take cognizance of the interests of directors and officers of licensees and applicants in order to preserve competition

12. The Commission noted in the *Report and Order* that neither the prior nor the new rules differentiated between UHF and VHF television. It concluded that as it and others were then studying the status of UHF, it would defer action on pending petitions to increase or eliminate the ceiling on UHF ownership to "the over-all UHF study."

13. Less than a month later, on December 24, 1953, it adopted a *Notice* proposing an increase in the permissable UHF ownership level.[27] Three petitions to permit additional UHF ownership had been filed: (a) an NBC proposal that there be no limit on the number of UHF stations owned; (b) a request by Allen B. DuMont Laboratories, Inc. ("DuMont") that the allowable maximum television ownership be increased to eight stations, of which no more than five could be VHF; and (c) an American Broadcasting Companies, Inc. ("ABC") proposal that the ceiling be raised to seven, with a five VHF maximum. The Commission stated that it believed initiation of the new rule making proceeding was appropriate "in order to encourage the rapid and effective development of the UHF band." It proposed action on the ABC "seven station" approach, finding this "best designed" to achieve the objective of UHF development "consistent with preventing an undue concentration of control of television facilities."

14. While the UHF proposal was under consideration, Senator Edwin Johnson of Colorado introduced a bill[28] which would have set a statutory ownership limit of five VHF stations, with two UHFs substitutable for one VHF (so that one might, for example, own four VHF and two UHF stations, up to a ten UHF maximum). Hearings were held on the Johnson bill in mid-1954, as part of a larger Senate review of the condition of UHF broadcasting.[29] The Commission opposed enactment of the bill. The Johnson proposal required a licensee that already had five VHF stations to dispose of one as a condition of obtaining two UHFs. The Commission did not believe those holding five VHF stations would sacrifice a VHF outlet for the

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and prevent monopoly in the broadcasting field." The Commission determined that in corporations with fifty voting shareholders or more, only the interests of shareholders who were officers or directors or held one percent or more of the outstanding voting stock need be considered under the rule. These "attribution" aspects of the "seven station rule" were subsequently modified on several occasions to give special treatment to the interests of various "passive" institutional investors. Further revisions to the "attribution" aspects of the multiple ownership rules are being considered in a separate Commission proceeding. *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 48 Fed. Reg. 10082 (March 10, 1983). They are not under review herein.

[27] *Amendment of Section 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations*, 18 Fed. Reg. 8904 (1953).

[28] S. 3095, 83rd Cong., 2d Sess. (1954).

[29] *Status of UHF and Multiple Ownership of TV Stations: Hearings Before the Subcomm. on Communications of the Senate Comm. on Interstate and Foreign Commerce*, 83rd Cong., 2d Sess. (1954).

sake of UHF ownership. It therefore saw the short-term impact of the Johnson bill as "maintenance of the status quo with respect to ownership of television stations by the networks or the other major interests in the broadcasting field."[30]

15. On September 17, 1954, no further action having been taken on the Johnson bill, a *Report and Order* was adopted in the UHF docket.[31] The modification of the television rule to allow for ownership of seven stations, a maximum of five being VHF, was enacted as proposed.[32] The Commission stated that this action was not a turning-away from its decision of a year earlier in the main "seven station" proceeding. However, it observed that a key factor in its decision was the belief that diversity should not always be its paramount consideration:

> Clearly if the only relevant consideration were implementation of the policy of diversification, an absolute limitation of one broadcast station to any one person or persons under common control would best serve the public interest. But, of course, that is not the case. The multiple ownership of broadcast stations does play an important role in our nation-wide broadcast system. The ownership of broadcast stations in major markets by the networks, for example, is an important element of network broadcasting. Our nation-wide system of broadcasting as we know it today requires that some multiple ownership of broadcast stations be permitted. We have always recognized these needs and have by rule permitted multiple ownership of broadcast stations in the light of such (other and competing) considerations. Here too it is our view that the greater good which will flow from the proposed rule offsets the disadvantage resulting from permitting individual licensees to own a larger number of stations.[33]

16. In dissenting from the decision, Commissioner Hennock objected in part to the fact that the rule established a uniform ceiling "for small and large stations alike without any reference to wide discrepancies in the size of areas covered or the population served. There is scant justification for giving equal treatment to seven widely scattered small stations and on the other hand to seven large powerful stations serving major markets in metropolitan centers like

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[30] Additionally, the Commission questioned whether it would be in the public interest in any case for any person to have an interest in more than seven television stations, even if a substantial percentage were UHF.

[31] *Amendment of Section 3.636 of the Commission's Rules and Regulations Relating to Multiple Ownership of Television Broadcast Stations*, 43 F.C.C. 2797 (1954).

[32] The Commission concluded that this action would be of particular assistance to UHF development "in the larger prefreeze markets where high VHF-only saturation obtains." It believed that it was "in these markets particularly where the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF."

[33] *Id.*, at 2801–2802. Additionally, the Commission stated that the rule continued to provide that "a grant of even one additional station would not be made where it 'would result in a concentration of control of . . . broadcasting in a manner inconsistent with the public interest, convenience and necessity.'" The Commission rejected the proposal of Ozark Television Corporation, St. Louis, ("Ozark"), that it adopt a "five and two and one-half" rule. Under the Ozark proposal an individual could have minority interests in five UHF stations in addition to control of five stations as permitted under the existing rule.

New York." Although Commissioner Doerfer concurred in the decision because the new rule provided greater flexibility than the previous version, he stated, "A number related to population, or areas, or capacity to program in the public interest is a more realistic guide or standard than a bare numerical evaluation. There is not much more than intuition as the basis for the present rule."[34]

17. The Commission's authority to promulgate such rules was put to the judicial test as a result of an appeal of the initial five station television limit by Storer Broadcasting Company ("Storer"). On November 25, 1953, the day the five station rule was adopted, the Commission dismissed Storer's application for a construction permit for Channel 10 in Miami.[35] The station would have been Storer's sixth VHF outlet. Storer argued on appeal that the Communications Act provided it with the right to a "full hearing" on its application. It contended that the Commission could only resolve such questions as what constitutes "concentration of control" on a case-by-case basis. The Court of Appeals for the District of Columbia Circuit agreed.[36] However, the Supreme Court held that the hearing requirement did not prevent the Commission from exercising "the rule making authority necessary for the orderly conduct of its business."[37] The Court stated that it in fact read the Act and regulations as providing a "full hearing" for those applicants who had "set out adequate reasons why the rules should be waived or amended." However, the Court found that no hearing need be held unless the application set forth reasons, "sufficient if true," to justify a change or waiver of the rules.[38]

C. *Action Since 1954.*

18. While the seven station numerical limitation has not changed since 1954, both the Commission and the Congress have from time to time given serious consideration to its modification. In these actions, Congress and the Commission generally have not focused on whether continuation of this type of regulation is appropriate, but have struggled with much the same issues raised in earlier deliberations. For example, in 1956 attention was drawn to legislation introduced by Senator John Bricker of Ohio[39] which would have adopted, for television only, a 25 percent population coverage limitation similar to that which Senator White proposed in

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[34] *Id.*, at 2803–2804.

[35] *Storer Broadcasting Company*, 18 F.C.C. 300 (1953).

[36] *Storer Broadcasting Company v. United States*, 220 F.2d 204 (D.C. Cir. 1955).

[37] *United States v. Storer Broadcasting Company*, 351 U.S. 192, 202–205 (1956).

[38] On remand, the Court of Appeals upheld the specific numerical limitation because no information was before the Court which outweighed the Commission's judgment that these limits were appropriate. *Storer Broadcasting Company v. United States*, 240 F.2d 55 (D.C. Cir. 1956).

[39] S. 3859, 84th Cong., 2d Sess. (1956). Virtually identical bills were introduced in the House as H.R. 10524, H.R. 10733 and H.R. 10756.

1947. The purpose of the Bricker bill was to encourage competition by facilitating the growth of independent stations. Bricker believed that substituting the 25 percent limit for the "sterile abstraction" of a seven station ceiling "entirely unrelated to factors of population and markets covered" would allow independents to obtain sufficient coverage to compete with the networks and perhaps become network operators themselves.[40]

19. During late 1956 and early 1957, there was also internal Commission consideration of possible alternatives to the rule, including such options as population coverage limits and case-by-case reviews of concentration issues.[41] However, no action was taken, and the October, 1957, release of a special Commission study of network broadcasting appears to have put an end to these deliberations.[42] The study was conducted by a special staff under the direction of Dean Roscoe L. Barrow of the University of Cincinnati College of Law, and is thus commonly known as the "Barrow Report."

20. The fundamental focus of the Barrow Report was "the effect of the television network structure and network practices on the concentration of control in the industry and on the opportunities for competition." However, the document also included a lengthy discussion of television multiple ownership as such, since its authors believed group ownership in television raised significant questions regarding competition.[43] As to modifying the numerical limit, the report concluded that if the Commission were to consider the matter *de novo*, a limit of one television station per licensee would best serve the public interest. However, it found that requiring the divestiture necessary to achieve this result would be inappropriate.

21. Considering other regulatory alternatives, the report argued that adopting a 25 percent population coverage ceiling would result in substantial increases in multiple ownership. A 10 percent population limit would as a general matter also allow a substantial increase, but would also have required divestiture by the three networks and at least one other multiple owner. Further, such a rule would have precluded any New York City licensee from owning a second station in any market of significant size.[44]

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[40] Additionally, the 25 percent figure would not have required any divestiture, as NBC, the largest owner in coverage terms, reached only 23 percent of the population within its service areas. *The Network Monopoly: A Report for the Comm. on Interstate and Foreign Commerce* 22–25, 84th Cong., 2d Sess. (1956).

[41] H.H. Howard, *supra* note 5, at 19–31.

[42] The report was subsequently published by the House of Representatives as *Network Broadcasting: Report of the Committee on Interstate and Foreign Commerce*, 85th Cong., 2d Sess. (1958).

[43] *Id.*, at 553–599.

[44] The report found similar problems with a "market rank" approach. Another alternative, that of considering ownership matters "case-by-case," would have required appropriate standards defining the "diversity of ownership" principle.

22. The report thus proposed that over a period of time the Commission seek "a pattern of ownership which approaches one to a customer as closely as the circumstances permit." More immediately, it recommended that a sub-element of the seven station rule be a limitation of no more than three VHF licenses in the top 25 markets. Although the Commission held hearings on the Barrow Report from March through July, 1959, no affirmative action was taken regarding its recommendations.[45]

23. In something of a reprise of Barrow's "top 25" proposals, the Commission again turned to consideration of numerical ownership limits in 1964, when its concerns regarding an apparent trend toward ownership concentration in major markets led to adoption of the "interim top 50 policy."[46] The policy required that applications to acquire a second VHF station in the top 50 markets be designated for hearing unless there was a "compelling affirmative showing." In 1965, the Commission proposed adoption of a rule prohibiting ownership of more than three television stations or two VHF stations in the top 50 markets, and established a new "interim policy" under which applications in conflict with the proposed rule would be designated for hearing "absent a compelling affirmative showing to the contrary."[47] In 1968, the Commission declined to formulate a rule, but adopted a "top 50 policy" which required licensees seeking to acquire a fourth television station or a third VHF station in the top 50 markets to make a "compelling public interest showing" that the benefits of the transfer would overcome the transfer's presumed "detriment with respect to the policy of diversifying the sources of mass media communications to the public."[48] The Commission eliminated the policy in 1979, having found that the feared trend toward additional ownership concentration had not occurred.[49]

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[45] H.H. Howard, *supra* note 5, at 37–38.

[46] *Hearings on Applications for Second VHF Stations,* 3 R.R. 2d 909 (1964).

[47] *Interim Policy Concerning Acquisition of Television Broadcast Stations,* 5 R.R. 2d 271, 272 (1965).

[48] *Multiple Ownership of TV Broadcast Stations,* 22 F.C.C. 2d 686 (1968).

[49] *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations),* 75 F.C.C. 2d 585 (1979), *recon. denied,* 82 F.C.C. 2d 329 (1980), *aff'g sub nom. National Association for the Advancement of Colored People v. FCC,* 682 F.2d 993 (D.C. Cir. 1982). During the years the policy was in effect, the Commission determined that a "compelling public interest showing" had been made in each of the 19 cases brought before it. Factors which were found to be "compelling" included financial revitalization and capital improvement of an ailing station, increase in diversity of media control in the local market, improved programming, buyer's "general lack of market dominance," absence of concentration of control by the acquiring entity, and improved service to minorities. *Tribune Publishing Co.,* 45 F.C.C. 2d 227, 229 (1974); L.A. Powe, Jr., *supra* note 5, at 88. The length and expansive nature of this list of itself raises serious question as to whether there was ever any need for the policy as such. For a more comprehensive analysis of the "top 50" proceedings and cases, see L.A. Powe, Jr., *supra* note 5, at 60–72, 87–95.

24. The issue has recently received Congressional attention in the House Communications Subcommittee's 1978–79 attempts to comprehensively rewrite the Communications Act.[50] The 1978 rewrite bill proposed a limit of five radio and five television stations, with no more than three television stations in the top 50 markets. Divestiture of existing holdings would not have been required. The only proposed limitation in the 1979 version of the bill was a seven station ceiling for television. Active consideration of legislation on the matter ended when rewrite efforts were abandoned.[51]

II. *Changed Circumstances and Arbitrariness*

25. It is clear from our examination of the record that there has always been substantial debate, within the Commission and elsewhere, regarding the use of the "seven station rule" and its numerical predecessors as limits on national ownership concentration. This debate, however, has only infrequently focused on the continued desirability, if any, of such regulation. Further, it generally has not involved questioning of the joint regulatory treatment of economic concentration and diversity issues, nor has there been much consideration given to delineating the relevant markets involved. Thus, absent more sophisticated analysis, the operation of the rule has historically engendered concern in two ways: (a) it does not take into account the signal coverage of the individual station or the size of the population its programming reaches; and (b) it may serve both to enhance the power of the three major networks and to preclude the initiation of new over-the-air networks and programming. Even when considered from this more traditional perspective, the growth in on-air broadcast stations suggests that the Commission's national ownership regulations are ripe for change. Indeed, after a thorough review of the matter, the Commission's most recent "network study" concluded that the use of the rule is "arbitrary and capricious."[52] When such factors as the recent development and

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[50] H.R. 13015, 95th Cong., 2d Sess. (1978); H.R. 3333, 96th Cong., 1st Sess. (1979).

[51] However, diversity and ownership concentration have been an area of continuing Congressional study. See, for example, *Telecommunications in Transition: The Status of Competition in the Telecommunications Industry, A Report by the Majority Staff of the Subcomm. on Telecommunications, Consumer Protection, and Finance* 235–390, 97th Cong., 1st Sess. (Comm. Print 1981) (hereinafter *"Telecommunications in Transition"*); *Print and Electronic Media: The Case for First Amendment Parity, National Telecommunications and Information Administration ("NTIA") Staff Report to the Chairman, Senate Committee on Commerce, Science, and Transportation* 56–109, 98th Cong., 1st Sess. (Comm. Print 1983) (hereinafter *"Print and Electronic Media"*).

[52] Network Inquiry Special Staff Final Report, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation* (Vol. I) 17, 361, 439 (1980) (hereinafter "*New Television Networks*"). Thus, even a commentator supportive of continued national television ownership regulation acknowledges that the present limit is "arbitrary," stating that "[t]here is no real basis for the number five or seven, and it makes little sense to equate a station in Butte with one in New York City." This

growth of alternative program sources are given consideration, the importance of regulatory change in this area is even more apparent.

26. When the Supreme Court approved promulgation of the "seven station rule," it did so with the expectation that "if time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations," the Commission would consider whether the rule should be modified or held inapplicable.[53] At the time the rule was adopted, television and FM were still in their infancy, development of both services having been severely retarded by World War II restrictions on private use of construction and electronic materials,[54] the subsequent "freeze" on television applications processing, and a 1945 decision by the Commission moving the FM service to a higher frequency band.[55] Thus, given the way in which the Commission had historically approached national ownership issues, it is not difficult to understand its concerns at that time regarding ownership concentration when one notes that early in 1953 there were only 96 fully licensed television stations, of which 30 were controlled by six group owners holding the then-maximum of five licenses each.[56]

27. However, as Table 1 below shows, the number of on-air stations has increased dramatically since 1953:

Table 1
Broadcast Stations On-Air 1953 and 1983[57]

	1953	*1983*	*Percent Increase*
TV	199	1,127	466%
AM	2,458	4,720	92%

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commentator argues for "revision and rationalization" of the limitation. H. Geller, *FCC Media Ownership Rules: The Case for Regulation*, 32 J. of Comm. 148, 155 (Autumn 1982) (hereinafter "H. Geller, *FCC Media Ownership*").

[53] *United States v. Storer Broadcasting Co., supra* note 37, at 205, citing *National Broadcasting Co. v. United States, supra* note 2, at 207, 225.

[54] Shortages were such that existing AM broadcasters were ordered to reduce power in order to conserve their equipment. Federal Communications Commission, *Ninth Annual Report* 46–47, 53–54 (FY 1943) (1944).

[55] This action rendered existing FM radios and transmitters obsolete, slowing the growth of FM for more than a decade. E.G. Krasnow and L.D. Longley, *Smothering FM With Commission Kindness*, in *The Politics of Broadcast Regulation* 107–117 (2d ed. 1978).

[56] Doubleday Broadcasting Co., Inc., *Amendment of Sections 73.35 and 73.240 of the Commission's Rules, Regarding Multiple Ownership* 4 (Petition for Rule Making) (October 6, 1982), citing Broadcasting, March 30, 1953, at 27. The number of commercial FM stations was actually in decline, and most were being operated by AM owners as part of AM-FM combinations. Federal Communications Commission, *19th Annual Report, supra* note 20, at 102, 115. Of an estimated 110 million sets in use, including combination models, only 25 million received television and only 10 million received FM broadcasts. *Id.*, at 113. Although the number of commercial AM stations was substantial, the national networks played a major role in the service through program distribution and through their ownership of a significant number of the Class I-A "clear channel" stations. See, for example, *FCC Report on Chain Broadcasting, supra* note 11, at 16, 23, 67. For a contemporaneous description of the clear channel service, see Federal Communications Commission, *Fourteenth Annual Report* 31 (FY 1948) (1948).

[57] 1953 figures as of June 30. Source: Federal Communication Commission, *47th*

FM	**686**	**4,532**	**561%**
Total Stations:	**3,343**	**10,379**	**210%**

28. We believe that the growth in the number of over-the-air stations since 1953 constitutes a fundamental change in the nature of the media marketplace that of itself calls for a reexamination of our approach to national ownership limitations. Such action is consistent with the Commission's view that its rules and policies should be drawn with an eye to the current market environment in which its licensees and applicants operate, "so as to facilitate maximum service to the listening and viewing public while minimizing the cost induced by regulation."[58] Further evidence of the need for this review is the enormous growth which has occurred in cable television and other non-traditional programming sources. Cable television has gone from an estimated 150 systems serving 30,000 subscribers in 1953 to approximately 5,000 systems with 29–32 million subscribers in mid-1983.[59] Thus, cable now passes about 60 percent of all television households, and 35–39 percent of television households now subscribe to cable service.[60] This is predicted to increase to the 46–50 percent range by 1985, and to as much as 60 percent by 1993.[61] Pay cable networking, which provides numerous

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Annual Report 96–98 (FY 1981) (1982). 1983 figures as of June 30. Source: FCC Release 5484, July 22, 1983. All figures include noncommercial stations. 1953 data includes on-air stations operating with construction permits, while 1983 data includes only licensed stations. For a depiction of the impact of this growth in selected radio markets, see the *Notice of Inquiry and Proposed Rule Making* in *Deregulation of Radio,* 73 F.C.C. 2d 457, 548 (1979).

[58] *Amendment of Section 73.3597 of the Commission's Rules,* 47 Fed. Reg. 985 (1982). As the Court of Appeals for the District of Columbia Circuit has stated, "'a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist.'" *City of Chicago v. FPC,* 458 F.2d 731, 742 (D.C. Cir. 1971), *cert denied,* 405 U.S. 1074 (1972), cited in *Home Box Office v. FCC,* 567 F.2d 9, 36 (D.C. Cir. 1977) *(per curiam), cert. denied,* 435 U.S. 829 (1977). See also *FCC v. Pottsville Broadcasting Co., supra* note 2, at 138; *Pinellas Broadcasting Co. v. FCC,* 230 F.2d 204, 206 (D.C. Cir. 1956), *cert. denied,* 350 U.S. 1007 (1956).

[59] *Television Factbook No. 50* (Services Volume 1981), at 83-a; *Broadcasting/Cablecasting Yearbook 1983* (1983), at D-3; CableVision, July 25, 1983, at 94; Communications Daily, June 20, 1983, at 10; Multichannel News, June 27, 1983, at 4.

[60] Arbitron puts July, 1983, penetration at 35 percent nationally. Communications Daily, August 3, 1983, at 4. See, also, CableVision, *supra* note 59. A.C. Nielsen estimates July, 1983, penetration at 39.3 percent nationally. Broadcasting, September 5, 1983, at 90.

[61] Donaldson, Lufkin & Jenrette, *Industry Viewpoint: Cable '82,* (October, 1982), at 13, estimates 46 percent. New York Times, April 7, 1983, at D. 20, cites estimate of 50 percent by Robert H. Alter, Cabletelevision Advertising Bureau. Other estimates generally center in this range. Multichannel News, June 13, 1983, at 35, cites Paul Kagan projection of 60 percent by 1993.

new programming options through satellite distribution, now reaches more than half of all basic cable subscribers.[62]

29. Other alternatives to conventional over-the-air broadcasting include multipoint distribution service ("MDS"), a microwave delivery service, and subscription television ("STV") from over-the-air stations. At the close of 1982, there were 99 MDS systems, serving approximately 565,000 subscribers. This service can be expected to expand significantly as a result of recent Commission action reallocating certain spectrum for multichannel MDS service.[63] Nineteen STV stations serve 985,560 subscribers. An estimated 100,000–150,000 subscribers received service from satellite master antenna television ("SMATV") services at the end of 1982. Industry sources expect the SMATV market to double from the 500,000 homes presently passed to one million homes by 1984.[64] Additional new service will be introduced as the Commission processes the more than 12,000 low power television station applications currently on file, and direct broadcast satellite ("DBS") service is expected to provide most Americans with additional viewing options in the near future.[65] Another option for consumers is offered by video cassettes and video discs. About 6.4 million home video cassette recorders ("VCRs") were in use throughout the country as of July, 1983, and VCR sales were booming at an annual rate of almost 5 million units a year. The video disc player is designed to be a relatively low cost video medium. Unlike the VCR, it is a playback-only device. In 1982, the first year of mass marketing, about 220,000 video disc players were sold in the United States.[66] Further, the Commission has recently acted to limit the protection from interference afforded

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[62] CableVision, *supra* note 59.

[63] Data on the number of MDS systems from Paul Kagan Associates, Inc., The Pay TV Newsletter, Census Issue (1983), at 2. Data as of December 31, 1982. Kagan reports that the operating MDS systems were marketing to areas comprised of almost 14 million dwelling units. As to multichannel MDS, see *Amendment of Parts 2, 21, 74 and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service*, 48 Fed. Reg. 33873 (July 26, 1983). By September 9, 1983, the filing deadline, an estimated 15,000 multichannel MDS applications had been submitted to the Commission.

[64] As to the number of STV stations and subscribers, see Broadcasting, September 5, 1983, at 36, citing Paul Kagan Associates data. Data on the number of SMATV subscribers from The Pay TV Newsletter, *supra* note 63, at 1, and Donaldson, Lufkin & Jenrette, *supra* note 61, at 61. As to estimate for 1984 SMATV expansion, see Multichannel News, May 23, 1983, at 21.

[65] *Direct Broadcast Satellites Services*, 90 F.C.C. 2d 676 (1982), *recon. denied*, FCC 83-241, released May 19, 1983; *Satellite Television Corporation*, 91 F.C.C. 2d 953 (1982); *CBS, Inc.*, 92 F.C.C. 2d 64 (1982). See, also, *GTE Satellite Corporation*, 90 F.C.C. 2d 1009 (1982), *recon. denied*, FCC 83-271, released June 23, 1983; Broadcasting, August 1, 1983, at 21.

[66] Electronic Industries Association, *Consumer Electronics Annual Review: 1983 Industry Facts and Figures* (1983), at 16, 18; TV Digest, August 15, 1983, at 10–12.

Class I-A clear channel stations so as to increase spectrum availability for new AM radio service, and has taken action which increases the number of potential FM stations by more than 600. Similar action to increase the number of VHF stations is under consideration.[67]

30. The increase in the number and stability of over-the-air stations over the past three decades, and the expected future increase in the number of such stations, combined with the existing development and projected growth of broadcast-like alternatives, suggest that the potential for such national ownership concentration as would tend to monopoly or threaten diversity is far less a matter of concern today than might have been the case in 1953 and earlier years, even if viewed from the same perspective.[68] Relaxation of the rule would, *inter alia*, allow us to mitigate the arbitrary nature of its impact and its negative effect on program development, and relieve a questionable regulatory restraint. Thus, even in the context of the traditional approach to national ownership matters, Commission action regarding our national ownership rules appears in order.

31. This is particularly the case in radio, where both the size of the audience reached and the number of stations owned by groups are an extremely low percentage of the whole, and only three owners have the maximum number of 14 outlets.[69] Table 2 shows the status of commercial station group ownership in radio since the early days of the medium, for groups with three or more stations. The current audience of the top group owners is found in Table 3.[70]

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[67] *Clear Channel Broadcasting in the AM Broadcast Band*, 78 F.C.C. 2d 1345 (1980), *reconsid. denied*, 48 R.R. 2d 1077 (1980), *aff'd sub nom. Loyola University v. FCC*, 670 F.2d 1222 (D.C. Cir. 1982); *Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Broadcast Assignments*, 53 R.R. 2d 1550 (1983); *Table of Television Channel Allotments*, 83 F.C.C. 2d 51 (1980). The multiplication in the number of AM and FM stations coupled with the recent reduction in protection offered clear channel stations has significantly reduced the once-dominant aural service role of the limited number of clear channel operators.

[68] As to cable television, we have recently held that "while the amount of concentration in the cable television industry is increasing it is still not a concentrated industry" and that "in general, there is no reason to suspect that any trend exists which is decreasing the vigor of competition between cable television operators in the franchising process or that the industry has reached or is likely to reach a point in the near future where concentration in it endangers the diversity of viewpoints received by the public." We therefore declined to adopt rules limiting multiple system ownership. *Amendment of Part 76, Subpart J of the Commission's Rules and Regulations Relative to Diversification of Control of Community Antenna Television Systems*, 52 R.R. 2d 277 (1982).

[69] One observer has remarked that the seven AM/seven FM limit has become "difficult to defend in light of the 9,000 stations and increasing numbers," and that given this "radio of abundance," revision is appropriate and is "unlikely to do much harm to the diversification principle." H. Geller, *FCC Media Ownership*, *supra* note 52, at 155.

[70] Although it appears important in the context of this proceeding to describe the nature of group ownership of broadcast stations, the limits on the significance of

Table 2
Commercial Radio Station Group Ownership 1929-1980[71]

Year	*Total No. of AMs*	*Total No. of FMs*	*No. of Group Owners*	*No. of Group-Owned Stations*	*Avg. No. of Stations Owned/ Group*	*Percent of Stations Under Group Ownership*
1929	600	—	12	20	1.7	3.3%
1939	764	—	39	109	2.8	14.3%
1951	2,295	558	63	253	4.0	8.9%
1953	2,495	537	88	423	4.8	14.0%
1970	4,304	2,145	250	1,432	5.7	22.2%
1978	4,498	3,010	324	1,906	5.9	25.4%
1980	4,572	3,267	360	2,124	5.9	27.1%

Table 3[72]
Top 20 Commercial Radio Station Group Owners As Ranked By Total Weekly Listeners—1983

Rank	*Ownership Unit*	*Number of Stations Owned*	*Total Weekly Listeners*
1	CBS	14	14,757,200
2	ABC	13	13,961,200
3	Westinghouse	11	9,632,500
4	NBC	9	9,298,400
5	RKO	11	8,482,200
6	Capital Cities	14	8,013,300
7	Metromedia	13	7,772,200
8	Bonneville	11	5,747,300
9	Gannett	13	5,659,100
10	Cox	12	4,837,100
11	Infinity	9	4,440,500
12	Doubleday	8	4,329,100

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this information should be noted. Concern with such data tends to overemphasize the impact of group ownership, to the detriment of the significance which should be placed on the number of competing stations/voices found in local markets. See J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets,* (FCC Office of Plans and Policy) (December 23, 1983), at 74. Based on the competitive nature of the radio marketplace, the Commission has eliminated most content-related radio regulation, an action recently affirmed in most respects by the Court of Appeals for the District of Columbia Circuit. *Office of Communication of the United Church of Christ v. FCC,* 707 F.2d 1413 (D.C. Cir. 1983). See, also, *FCC v. WNCN Listeners Guild,* 450 U.S. 582 (1981).

[71] Source: M.O. Wirth, *The FCC's Multiple Ownership Rules and National Concentration in the Commercial Radio Industry,* (prepared for the National Association of Broadcasters) Table I (1981). Except for 1929 and 1939 data, only groups which owned three or more stations generally are included in the group ownership statistics, due to the limitations of available data. 1929 and 1939 figures should be viewed as approximations, due to limitations of source material.

[72] Source: J.H. Duncan, Jr., *American Radio: Spring 1983 A-38, A-40 (1983). Based on Arbitron data. Data includes those individuals 12+ who listened to the station for five minutes or more during a given week. Data includes AM and FM stations. Source counts simulcast AM-FM stations as single stations, and includes only those groups with five or more stations showing up in market rating books (which does not substantially impact above list).*

13	Greater Media	10	3,978,800
14	Tribune Co.	5	3,954,500
15	Taft	11	3,812,700
16	Inner City	7	3,520,300
17	Malrite	13	3,410,200
18	Plough	12	3,252,200
19	Viacom	9	3,138,900
20	Blair	8	3,137,000
	TOTAL	213	

32. In addition to the growth in the number of radio stations, in recent years significant expansion in the number and diversity of national and regional radio networks has broadened the availability of programming for local stations. The number of national networks has grown from the historic four—ABC, CBS, NBC and Mutual—to an estimated 19 at the close of 1981.[73] There are 98 regional networks which also meet diverse needs.[74] However, no networks (or other sources) dominate radio station ownership or the supply of its audio content.[75]

33. While group ownership plays a more significant role in television than radio, with 72 percent of all commercial television stations group-owned in 1982, there is substantial national ownership diversity. The 571 group-owned commercial television stations operating at the beginning of 1982 were controlled by 169 different entities. Table 4 depicts the state of television group ownership from 1956 to 1982, while Table 5 shows the distribution of group owners by number of stations. Table 6 ranks the 20 largest groups by "net weekly circulation."

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[73] National Association of Broadcasters Committee on Science and Technology, *New Technologies Affecting Radio and Television Broadcasting* 37 (1981). This development has apparently been facilitated by our 1977 elimination of the "chain broadcasting" prohibition on dual networking in radio discussed at paragraph 5, *supra*. It should be noted that stations can affiliate with more than one network.

[74] *Broadcasting/Cablecasting Yearbook 1982* D-46-D50 (1982).

[75] *Telecommunications in Transition, supra* note 51, at 276, 278–279, 340–342.

Table 4[76]

Commercial Television Station Group Ownership 1956-1982

		1956			*1966*	
	Group Owned	*Total Stations*	*% of Total*	*Group Owned*	*Total Stations*	*% of Total*
VHF	175	369	47%	336	480	70%
UHF	30	87	35%	60	112	54%
	205	456	45%	396	592	67%

		1972			*1982*	
	Group Owned	*Total Stations*	*% of Total*	*Group Owned*	*Total Stations*	*% of Total*
VHF	362	507	71%	418	518	81%
UHF	85	181	47%	153	272	56%
	447	688	65%	571	790	72%

Table 5

Number of Commercial Television Station Ownership Groups 1972, 1982 and 1983[77]

Number of TV Stations Owned	*1972 Groups*	*1982 Groups*	*1983 Groups*
2	64	62	62
3	34	44	46
4	20	28	29
5	20	15	13
6	5	12	15
7	1	8	9
Total Group Ownership	144	169	174

Table 6

Top 20 Commercial Television Station Group Owners As Ranked by Net Weekly Circulation 1980, 1982, 1983[78]

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[76] Source: P.W. Cherington, L.V. Hirsch, and R. Brandwein, *Television Station Ownership* 121 (1971); *Broadcasting Yearbook 1972* (1971); *Broadcasting/Cablecasting Yearbook 1982, supra* note 74; *Television Factbook*, Vols. 42, 50 and 51 (Stations Volumes 1972, 1981 and 1982). Totals found in Tables 4 through 7 and the associated text may vary due to the use of several sources and varying methodologies for data compilation. Such data tends to overemphasize the significance of the increase in group ownership, to the detriment of the attention which should be given the increase in the total number of voices and the number of competing stations/voices found in local markets.

[77] Ownership defined as majority shareholder or by a principal of the group being president of the station licensee. Source: *Broadcasting Yearbook 1972, supra* note 76; *Broadcasting/Cablecasting Yearbook 1982, supra* note 74; American Research Bureau, Inc., *ARB 1972 Television Market Analysis (1972)*; The Arbitron Company, *1981–1982 Television Markets and Rankings Guide* (1981); *Television Factbook*, Vols. 42, 50, and 51, *supra* note 76; H.H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983*, at 6 (prepared for the National Association of Broadcasters) (1983), citing *Television Factbook*, Vol. 51, *supra* note 76, and other sources noted at 4.

[78] Source: H.H. Howard, *Television Station Group Ownership and Cross-media*

	Rank			*Net weekly Circulation*	*Number of*
Group Owner	*1980*	*1982*	*1983*	*(Households)*	*Stations*
CBS	2	2	1	15,722,300	5
ABC	1	1	2	15,695,800	5
Metromedia	3	4	3	15,425,100	7
NBC	4	3	4	14,814,500	5
Tribune Co.	5	6	5	10,124,400	3
Westinghouse	7	7	6	8,899,000	6
RKO General	6	5	7	8,068,400	3
Storer	8	8	8	7,313,000	7
Field Communications	9	9	9	7,257,500	5
Gaylord	10	11	10	6,120,000	7
Cox	12	13	11	6,047,600	6
Capital Cities	11	10	12	5,973,900	6
Taft	13	12	13	5,947,800	7
Hearst	14	20	14	4,453,500	5
Scripps-Howard	15	14	15	4,249,900	6
Post-Newsweek	18	15	16	4,011,300	4
Times-Mirror	16	17	17	3,933,900	7
Gannett	17	18	18	3,902,000	7
Corinthian	19	19	19	3,756,500	6
Golden West	21	16	20	3,457,000	2

34. The estimated total number of television households in the United States at the beginning of 1983 was 83.3 million.[79] Based on the available circulation data, no group owner reached as much as 20 percent of these television households. Only four owners—CBS, ABC, Metromedia, and NBC—had stations with a net weekly circulation of more than 15 percent of all television households.[80] Two groups reached between 10 and 15 percent of television households, nine between 5 and 10 percent, 21 between 2.5 and 5 percent, and 43 between one and two and one-half percent. An additional 95 groups reached less than one percent. Seventy-two of these smaller groups had net weekly circulation of fewer than 500,000 households, while 35 reached fewer than 250,000 households weekly.[81]

Ownership—1982 11 (prepared for the National Association of Broadcasters) (1982). Data compiled from *Television Factbook No. 50, supra* note 76, and other sources, as cited at 3, 10. H.H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983, supra* note 77, at 14–15. Although Howard indicates that data on the number of stations owned by each group is current as of January 1, 1983, the net weekly circulation statistics, which he compiled from Television Factbook No. 51, *supra* note 76, are based on 1981 Arbitron data. Similarly, the net weekly circulation rankings for 1982 and 1980 appear to have been drawn from Television Factbook reports which in turn were based on earlier years' Arbitron data. Net weekly circulation indicates the estimated total number of different households reached at least once each week by a given station.

[79] H.H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983, supra* note 77, at 7, citing A.C. Nielsen Co. data.

[80] However, the three networks actually reach more than 95 percent of all households through their affiliates and owned-and-operated ("O&O") stations, H.H. Howard, *Television Station Group Ownership, supra* note 78.

[81] H.H. Howard, *Group and Cross-Media Ownership of Television Stations in 1983, supra* note 77, at 7–8.

35. Table 7 lists the owners of six and seven station television groups:

Table 7[82]
Largest Commercial Television Group Owners
By Number of Stations—1983

Seven Stations	*Six Stations*
Bahakel	Capital Cities
Gannett	Corinthian
Gaylord	Cosmos
Metromedia	Cox
Park Broadcasting	Forward
Spanish International	Harriscope
Storer	Lee Enterprises
Taft	Liberty
Times-Mirror	Meredith
	Multimedia
	Scripps-Howard
	Standard Communications
	Trinity
	Westinghouse
	Wometco

36. As Tables 6 and 7 indicate, those firms with the largest net weekly circulation are not necessarily those with the greatest number of stations. Only 11 of the top 20 owners in terms of net weekly circulation have six or seven stations. Park Broadcasting holds seven stations, but ranks 35th in net weekly circulation, with 2,065,600 households.[83] This is less than one-quarter the net weekly circulation of the three stations owned by fifth-ranked Tribune Co. Spanish International, controlling seven stations, ranks 83rd in net weekly circulation, with 752,600 households. This is less than eight percent of Tribune's three station net weekly circulation. The effect of population disparities can also be depicted by noting that one station in the New York City market can potentially reach more people than one station in each of the seven markets between 14 and 20.[84] To equal the potential reach of a New York City station, one would need to own one station in each of the bottom 86 markets. While an owner of stations in each of the top seven markets can reach 27.5 percent of the U.S. population, stations in each of the bottom seven markets collectively reach less than one-half of one percent of the population. This data makes clear the arbitrary nature of the "seven station" rule.

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[82] *Id.*, at 13–22.

[83] In mid-1977, Park Broadcasting became the first group owner to hold the permissible limit of seven stations in each service. *Who Owns, supra* note 5, citing Broadcasting, June 27, 1977, at 24.

[84] Arbitron ranks markets according to population. The New York market encompasses 8.33 percent of the nation's population. Market number 14 has 1.3 percent of the total population. Markets 14 through 20 hold 8.32 percent of the total population.

III. *Discussion and Proposals.*

37. As we have earlier discussed, the Commission has not over the years been unaware of the inequities inherent in utilization of an absolute numerical limitation on national station ownership. It took note of these criticisms at the time the rule was adopted, conducted internal studies of the matter several years later, and studied the issue again when it considered the recommendations of the "Barrow Report".[85] Rather, it appears that the "seven station rule" was adopted and survived subsequent review because it seemed to the Commission to be the best option available at the time, given the nature of the Commission's analysis and policy objectives and the level of industry development. The growth in the broadcasting industry over the past three decades, as well as the development of other media program sources, suggest that a substantial revision of our national ownership rules is in order. In light of these changes the continued application of a regulation as arbitrary in nature as the "seven station" rule is increasingly suspect. The growth of the industry may have simply rendered the rule obsolete. Further support for the modification of the present restrictions comes from the possibility of programming expansion which may result. Our new analytic perspective on the issue also suggests that change may be appropriate.

38. One concern which has been generated by the inequities inherent in the rule's application is that in the course of furthering ownership diversity, the "seven station rule" may actually limit the "diversification of program and service viewpoints" that it was intended to advance. This is because the rule may in some instances preclude the possibility of realizing the benefits inherent in program production or acquisition for large audiences.[86] Ownership of a sufficient number of stations to generate a base for quality program production might well facilitate development of a new over-the-air television network in the future. It is likely in any case to lead to expanded production of programming, including non-entertainment programming, for national, regional, and group presentation to the viewing and listening publics. The access to a larger potential audience which a group owner enjoys reduces the level of difficulty involved in getting initial distribution of an unproven first-run show or series, cuts marketing expenses, and assists in generating revenues that could be used to finance even more attractive, higher quality programming. Cooperative production or distribution by larger groups is another possible vehicle by which enhanced programming options can be provided.[87]

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[85] See paras. 10, 19 and 21, *supra.*

[86] This was in fact the problem Senator Bricker was attempting to address through his 1956 proposal substituting a 25 percent population coverage limit for the seven station restriction on television ownership. See paragraph 18, *supra.*

39. By maintaining regulations which tend to interfere with development of additional programming, the Commission may inadvertently be strengthening the significant role of the three major networks in national program distribution. The Commission has recognized the historic role of owned-and-operated stations in development of the network system.[88] It appears somewhat anomalous to prevent potential competitors from realizing the similar advantages which might be obtained through establishment of larger groups, so long as diversity is not harmed. And, indeed, from the perspective of programming availability, diversity may in fact be enhanced by the growth of these groups. In this regard, we note that an integrated firm can realize efficiencies that are not obtainable when programmers merely contract with stations for distribution.[89][90]

40. As we have observed at para. 11, *supra*, the stated purpose of the "seven station rule" is "to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent any undue economic concentration contrary to the public interest."[91] Diversification of ownership, then, has been viewed, as the vehicle by which to assure diversity in sources of information and foster economic competition. Of these objectives, the Commission has in its various ownership policies placed "principal reliance on ensuring diversity in sources of information because of the part such diversity serves in reaching First Amendment goals."[92] Even diversification must give way,

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[87] Although the prospect of a new fulltime over-the-air television network has brightened in recent years, the creation of such a network does not appear imminent. R.E. Park, *New Television Networks: An Update*, in *New Television Networks; Entry, Jurisdiction, Ownership and Regulation*, *supra* note 52, at 177–180. However, changes in the rules may facilitate the development of part-time "networks" such as "Operation Prime Time" and "Independent Network News." Both Metromedia and a consortium of group owners including Tribune Broadcasting, Taft Broadcasting, Gaylord Broadcasting and Chris Craft Industries are presently attempting to established prime time movie "networks" of this sort. Broadcasting, May 16, 1983, at 83; Wall Street Journal, July 27, 1983, at 8. A sufficient economic base and substantial potential audience coverage appear to be key factors governing such endeavors. See, for example, Variety, March 16, 1983, at 43; L.A., Powe, Jr., *supra* note 5, at 89–92.

[88] See paragraph 15, *supra*.

[90] See also, for example, A. Parkman, *An Economic Analysis of the FCC's Multiple Ownership Rules*, 31 Admin. L. Rev. 205, 218–221 (1979); R.G. Noll, *Television and Competition*, in Federal Trade Commission Bureau of Competition, *Proceedings of the Symposium on Media Concentration* 243, 249–251 (Vol. 1, 1979); G.G. Trask, *The Palace of Humbug—A Study of FCC Policies Relating to Group Ownership of Television Stations*, 22 Fed. Comm. B.J. 185, 207–209 (1968).

[91] *Amendment of Sections 3.35, 3.240 and 3.636 of the Rules and Regulations Relating to the Multiple Ownership of AM, FM and Television Broadcast Stations*, *supra* note 20, at 292–293.

[92] *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations)*, *supra* note 49, at 585–586. See, also, *Multiple Ownership*, 50 F.C.C. 2d 1046, 1079 (1975) (*Second Report and Order* in Docket 18110). "[T]he 'public interest' standard necessarily invites reference to First Amendment

however, if when all factors are considered, the "public interest harms outweigh the potential gains that would follow" if the diversification-maximizing action were taken. A key factor to be considered in this regard is whether the action maximizing diversification would hinder "the best practicable service to the American public."[93] Thus, proper review of national ownership policy involves separate consideration of the treatment of First Amendment and economic policy issues, as well as an examination and balancing of competing public interest concerns.

41. The element of the Commission's diversification policy regarding economic concentration derives from antitrust policy. The Commission has historically considered such matters under the public interest standard without regard to whether an actual antitrust violation is involved.[94] Antitrust law as such is, however, under the jurisdiction of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") and involves significantly different considerations than might be at issue from a First Amendment standpoint. For example, in a situation involving advertiser-support media, the antitrust concern may in part be related to preserving competition in advertising, while the diversity issue involves the sources of information available to the consumer.[95] Accommodating the economic aspect of the Commission's diversity policy to actual marketplace conditions may require complex case-by-case analyses regarding the nature of the relevant market, which would significantly strain the Commission's resources and expertise. Further, such activity is duplicative of that regularly performed by DOJ and FTC, the expert agencies in this area. Thus, at least as to national ownership policy it may be appropriate to defer to DOJ and FTC on antitrust concerns. Such action could range from establishment of a

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principles," *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 122 (1973), and, in particular, to the First Amendment goal of achieving "the widest possible dissemination of information from diverse and antagonistic sources," *Associated Press v. United States*, 326 U.S. at 20." Cited in *FCC v. National Citizens Committee for Broadcasting, supra* note 89, at 795.

[93] *FCC v. National Citizens Committee for Broadcasting, supra* note 89, at 804–805.

[94] See, for example, *National Broadcasting Co., v. United States, supra* note 2, at 223; *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33–34 (D.C. Cir. 1950). The Supreme Court has observed, in dictum, that in a given licensing case antitrust considerations might keep the public interest standard from being met, "as when the publisher of the sole newspaper in an area applies for a license which, if granted, would give him a monopoly of that area's major media of mass communications." *United States v. Radio Corporation of America, supra* note 2, at *Broadcasting, supra* note 89, at 796.

[95] See, in a slightly different context, *Multiple Ownership, supra* note 92, at 1079. DOJ is responsible for enforcement of the Sherman Act, and shares responsibility with FTC for enforcement of the Clayton Act. Under the applicable case law, FTC can take action against practices which violate the Sherman Act under Section 5 of the Federal Trade Commission Act, for which it has sole enforcement authority. Von Kalinowski, *Antitrust Laws and Trade Regulation* (Desk Ed. 1982), at §1.06.

formal liaison relationship on these matters, perhaps conditioning any action in proceedings involving antitrust issues to FTC or DOJ review, to a policy simply limiting the Commission's antitrust considerations in this area to those required by Section 313 of the Communications Act. We note that private parties threatened by antitrust violations may sue for injunctive relief under Section 16 of the Clayton Act, and those whose business or property is injured as a result of an antitrust violation may sue for treble damages under Section 4 of the Clayton Act. Court costs and attorney's fees are recoverable, as is simple interest on the amount of actual damages in Section 4 actions. Thus, those individuals and institutions most directly affected have a private right of action available.[95A] We solicit comment on this proposal.[95B]

42. As an alternative to this action, the Commission may choose to pursue development of a methodology to assess economic concentration in the market(s) found relevant to national broadcast ownership. The Commission has initiated a proceeding which, *inter alia*, seeks a method of assessing concentration that could facilitate uniform treatment of ownership issues in all FCC-regulated media services.[96] This effort may result in development of an index, or indices, which would likely be utilized in general policy deliberations and which would be utilized, for regulatory purposes, in determining whether particular transaction(s) might lead to unacceptable levels of concentration. We hereby incorporate by reference herein the comments submitted in that proceeding, CT Docket No. 82–434, to the degree that they treat the concentration issue. Parties who have submitted comments on indexing in CT Docket No. 82–434 may wish to respond to this *Notice* with particular attention to concerns regarding national broadcast ownership.[97]

43. Consideration of economic concentration requires defining both a product market and a geographic market. The basic test for

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[95A] Von Kalinowski, *Antitrust Laws and Trade Regulation*, *supra* note 95. During the twelve months ended June 30, 1982, a total of 1,148 antitrust cases were filed in the U.S. district courts. This included 29 U.S. civil cases, 82 U.S. criminal cases, and 1,037 private actions. *Annual Report of the Director of the Administrative Office of the United States Courts 1982* (1983), at 102–103.

[95B] In this regard, we specifically request comment as to whether anything more than the consideration of these issues in the rulemaking context may be required by the holdings in such cases as *Northern Natural Gas Co. v. Federal Power Commission*, 399 F.2d 953, 958–961 (D.C. Cir. 1968) and *United States v. FCC*, 652 F.2d 72, 81–82 (D.C. Cir. 1980), viewed in the light of the Supreme Court's decision in *FCC v. WNCN Listeners Guild*, *supra* note 70. See, also, notes 2 and 94, *supra*.

[96] *Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations Relative to Elimination of the Prohibition on Common Ownership of Cable Television Systems and National Television Networks*, 47 Fed. Reg. 39212 (September 7, 1982) (hereinafter *"Amendment of Part 76"*).

[97] In taking this action, we in no way express any view as to the outcome of that proceeding.

inclusion within a product market is the interchangability or substitutability of products from the viewpoint of potential buyers. A geographic market "usually is the area in which a firm sells in active and reasonably equal competition with other firms,"[98] and may be national, regional or local in character. In this regard, as to economic concentration the traditional Commission approach to national ownership requires that the relevant market be a national broadcast market for viewers and listeners (who are the products in an advertiser-supported system).

44. Accepting the conception of the national market, it appears that the market is relatively unconcentrated. One frequently-used measure of concentration is the Herfindahl-Hirschman Index ("HHI") presently utilized by the Justice Department,[99] while a related measure is the market share of the top firms in the defined market. Based on revenues, the Commission has calculated the market shares of the top three, six and 12 group owners of television and radio stations, as well as the HHI:

Table 8[100]

Group Owners		*Concentration of Broadcast Revenues*	*HHI*
Television	Top 3	14.2%	(
	Top 6	23.0%	(<229

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[98] M. Botein, *Jurisdictional and Antitrust Considerations in the Regulation of the New Communications Technologies*, 25 N.Y.L.S.L. Rev. 863, 882 (1980) (hereinafter *"Jurisdictional and Antitrust Considerations"*).

[99] *U.S. Department of Justice Merger Guidelines*, issued June 14, 1982, at 17. See F.M. Scherer, *Industrial Market Structure and Economic Performance* 56–64 (2d ed. 1980), for a discussion of the Herfindahl index and other measures of concentration. See, also, K. Gordon, J.D. Levy, and R.S. Preece, *FCC Policy on Cable Ownership* (FCC Office of Plans and Policy Staff Report) (November, 1981), at 86–90.

[100] Financial data for each group owner was complied using each station's 1980 Financial Form 324. Total revenues from *Television Broadcast Financial Data - 1980*, August 10, 1981, and *1980 AM/FM Financial Data*, March 15, 1982, were used for indexing purposes. The three-firm concentration ratio was computed, rather than a four-firm ratio, due to certain concerns related to data confidentiality. Due to resource limitations, the exact revenue market share of every owner could not be computed. Shares were calculated, as indicated, for the top twelve group owners, and the share of the thirteenth owner in each service was identified. No owner would have a greater share. To potentially maximize the HHI, it was assumed that television station owners thirteen through fifty-one and radio station owners thirteen through one hundred thirty-nine each received the same share of total revenues. In both cases, this computation virtually exhausted the market share remaining after the top twelve owners' shares were calculated. This data was used to compute the HHI. Thus, the actual HHI in each case is somewhat less than the figure shown above. Net weekly circulation and "cume" (listeners) might also be utilized as the basis of this calculation. However, since net weekly circulation and cume reflect only limited viewer/listener attention to the station involved, one might choose instead to use audience share. One could, for example, use prime time audience share for

	Top 12	34.9%	(
Radio	Top 3	6.6%	(
	Top 6	10.9%	(<77
	Top 12	16.3%	(

45. The low concentration ratios shown in Table 8 compare to such four-firm sales ratios as 90 in cereal breakfast foods, 85 in refrigerators and 47 in farm machinery and in motors. Nonetheless, the data in Table 8 may overestimate the degree of concentration due to the absence of other relevant media in the calculation. It may be, for example, that the relevant video market is a national market for consumer-oriented video output, in which television stations, cable systems, MDS, STV, LPTV, SMATV and DBS all compete. This market may also include video cassettes and video discs. The market may be seen as one for electronic media output, and include radio. In some cases, the market may be conceptualized as a national market for information output, and include the print media and computer data base suppliers. Carried a step further, the market may be viewed as one for information/entertainment, and include movies, records and tapes, if not theater, live music and similar events.[101]

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television and drive time share for radio. The difficulty which inheres, of course, is that audience share is an extremely volatile measure. However, there are similar problems, albeit not as great, in the use of net weekly circulation, revenues, or any other standard subject to constant adjustment. Market share volatility highlights the importance of the potential competition in a market, and argues for the use of "reach" as the basis for an index. DOJ generally considers markets with an HHI of less that 1000 to be unconcentrated, and is unlikely to challenge mergers falling in that area. In markets with an HII of between 1000 and 1800, mergers producing an increase in the HHI of less than 100 points are unlikely to be challenged. Markets with an HHI above 1800 are considered to be highly concentrated, and in those situations DOJ is likely to challenge mergers which increase the HHI by more than 50 points. *U.S. Department of Justice Merger Guidelines, supra* note 99, at 19–20. From this perspective, the traditional broadcast industry is extremely unconcentrated.

[101] As to concentration ratios, see Scherer, *Industrial Market Structure and Economic Performance, supra* note 99, at 62, citing 1972 U.S. Census data. In CT Docket No. 82–434, the use of net weekly circulation for free services and subscribers for pay services as measures of concentration, use of the HHI as a test of the level of concentration, and a possible downward adjustment of acceptable concentration to take viewpoint diversity concerns into account have been suggested. The House Telecommunications Subcommittee staff discusses a "video market" in which all video services potentially "compete as relatively substitutable options available to the consumer." However, the Subcommittee staff believes there is presently low cross-elasticity between submarkets, and that the "video market is as yet an emerging market." *Telecommunications in Transition, supra* note 51, at 273–274, 279–280, 360–361, 374–376. As to radio, the Subcommittee staff identifies an "audio market" comprised of radio programming, records and tapes. *Id.*, at 273. The Subcommittee staff notes that some observers suggest the market parameters include all mass media as components of a large information market. Professor Michael Botein of New York Law School argues that "[a]t the very least, the product market presumably would include all methods for delivering real-time video programming to a viewer." *Jurisdictional and Antitrust Considerations, supra* note 98, at

46. As we have indicated, there is substantial debate as to the nature of the relevant market, focusing in significant part on the degree to which various products may correctly be considered substitutes available at competitive prices. Further, the Commission acknowledges that the market may be changing so quickly that any analysis will be valid only at a particular, and brief, point in time. Additionally, it has been suggested that such an analysis fails to take a sufficiently broad view of the nature of competitive markets relevant to antitrust considerations for it to be of utility.[102] The Commission recognizes that given the complexity of the analytic task, it may well be that for the purpose of our specific consideration of the "seven station rule" it will be necessary to resolve this proceeding based on the limited question of whether the degree of competition in the television and/or radio industries is sufficient, and the potential anticompetitive impact sufficiently remote, to support elimination or modification of the rule.[103]

47. We note, in this regard, that the staff of the Commission's Office of Plans and Policy ("OPP") takes a somewhat different approach to the nature of the market, arguing that the economic market, whether for viewers in an advertiser-supported system, or for distribution of programming by outlets in a subscriber-supported system, is essentially local in nature. OPP's analysis is that the concerns of participants in a given local market are the competition and diversity of voices in that market, and not the transactions and programming in which group owners in that market are involved in other locales. The OPP staff thus concludes that "[i]f every local market were sufficiently competitive, then no national or regional ownership rules would be necessary or desirable."[104] The OPP staff has, however, also estimated the concentration in an assumed national market, finding as a general matter, for example, that a national video market comprised of conventional broadcast televi-

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881. "Real-time" programming means "programs which are transmitted without any modification in the rate of data transfer," and might include broadcast television, cable, STV, MDS, DBS, SMATV, and low power. The FCC Office of Plans and Policy ("OPP") and Professor Botein suggest that it may be appropriate to distinguish between pay and advertiser-supported programming. *Id.*, at 881–882; *FCC Policy on Cable Ownership, supra* note 99, at 65–66. See also, the record in CT Docket No. 82–434, incorporated herein by reference.

[102] See, for example, DOJ Reply Comments in CT Docket No. 82–434, at 10–11. We draw no conclusions on DOJ's views at this time.

[103] A key concern, which parties are requested to address with particularity, is the utility of various measures of concentration as regulatory devices in the processing of the thousands of applications for construction of new stations, transfers and assignments presently disposed of each year in the broadcast services.

[104] J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets, supra* note 70, at 7–8. The Commission is inserting the OPP staff report in the record of this proceeding, and requests comment on the report insofar as it is relevant to consideration of the "seven station rule."

sion, cable, STV and MDS is, from a video distribution standpoint, "extraordinarily unconcentrated," with a four-firm concentration ratio of 8.7 percent and an HHI of 35.5.[105] Using net weekly circulation and basic subscribers as measures, OPP found that if affiliates are attributed to their networks, the four-firm concentration ratio is 61 percent and the HHI is 1112, within the range in which DOJ might scrutinize a proposed merger.[106] However, OPP made clear that it does not believe such attribution is appropriate.[107]

48. A question which arises is the degree to which proper consideration of a national video output market requires that attention be given to the role of national program distributors, such as the three commercial networks and the cable networks and program syndicators, through their affiliated stations and systems. We solicit comment on the significance of these relationships, if any, to our review of the seven station rule. Another matter to be considered is the impact, if any, of relaxation of the seven station rule upon small businesses, and upon station ownership by minorities and women. It appears that such changes would facilitate the ability of new entrants to obtain funding from investors who desire equity interests in the stations (which are generally treated as though they were controlling interests under the rule). Additionally, modification of the rule would allow small business owners, including minorities and women, to put together larger groups which would be able to more easily produce desired special interest programming. It is difficult to ascertain the impact, if any, which such a freeing of the market might have on station prices, if, for example, larger existing multiple owners are more active in purchasing stations in certain market segments (for example, the "top twenty" or "top fifty"). While it appears that, when all factors are considered, the relaxation of the rule will prove beneficial to minorities, women, and small broadcasters, we request comment on this issue.

49. The Commission solicits comment on the issues raised above, and on such other and related matters as parties believe may be relevant to our consideration of the elimination or modification of the "seven station rule." We note that the perspective from which the Commission approaches this matter is our concern for the enhancement of consumer welfare in the public interest, and it is in that context that these issues should be addressed. In commenting on

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[105] *Id.*, at 80–99. The HHI initially computed (29.9) has been corrected. The market analysis is based on "household access units", a measure of availability of a video distribution system to a given household.

[106] *Id.*, at 90–92. The HHI initially computed (1142) has been corrected.

[107] OPP noted that a substantial proportion of affiliate programming is not network-provided, and affiliates may refuse to clear network programming if they desire. Additionally, affiliates are increasingly turning to programming from other sources. Finally, under Commission regulations, the licensee retains ultimate programming responsibility. *Id.*, at 75–76.

these issues, parties are requested to address not only the matter of market definitions, but also the measures of market share and concentration levels which may be relevant to our deliberations.

50. The Commission seeks comment on the appropriate use of such measures of market share as revenues, net weekly circulation, subscribers, ratings, and availability ("reach" or "homes passed"), and on the use of indices of concentration including but not limited to the HHI and the four-firm concentration ratio. We urge that these comments be targeted to the matter before us, the modification of the "seven station rule," as to both television and radio.

51. As we have noted at para. 40, *supra*, the Commission's principal concern in implementation of its policy of diversification of ownership has not been the enhancement of economic competition but, rather, the advancement of diversity in sources of information in order to further First Amendment values. Unfortunately, the difficulty of analyzing economic concentration fades in comparison to the problems involved in dealing with diversity of information. As the OPP cable study comments, the "antitrust laws are not meant to promote the exercise of First Amendment rights."[108] Thus, Dr. Benjamin M. Compaine of Harvard University's Program on Information Resources Policy has stated, "once we abandon the antitrust standard for concentration, there is no acceptable guideline for what constitutes too few voices."[109] Consequently, as Dr. Michael Wirth of Denver University remarks, "[t]he selection of any numeric national ownership standard is necessarily arbitrary."[110]

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[108] *FCC Policy on Cable Ownership, supra* note 99, at 81. See also D.I. Baker, *Uses and Abuses of Antitrust Principles in Dealing with Media Concentration Questions*, in Federal Trade Commission Bureau of Competition, *Proceedings of the Symposium on Media Concentration, supra* note 90, at 649 (Vol. II).

[109] B. M. Compaine, *Conclusion: How Few Is Too Few?* in *Who Owns, supra* note 5, at 487. A number of the commenters in CT Docket No. 82–434 express similar views. For example, CBS, Inc. states, "Measurements which seek to go beyond economic factors and attempt to measure the appropriate degree of political or ideological concentration seem almost impossible to create." *Comments of CBS Inc.*, at 32. Time Inc. states that it "is not aware of any developed learning that explains how to utilize a measurement derived from an index intended to assess the market power of industrial organizations as a means of analyzing diversity." Time suggests that questions of diversity "have a complexity and inevitable subjectiveness not amenable to analysis by numerical means." *Comments of Time Inc.*, at 30. Baseman and Owen state that "[t]here is obviously no single desirable "magic" number of independent editorial voices." K.C. Baseman and B.M. Owen, *A Framework For Economic Analysis of Electronic Media Concentration Issues*, prepared for submission by the National Cable Television Association in Docket No. 82–434, December, 1982, at 48. We draw no conclusions herein as to the action to be taken in CT Docket No. 82–434, citing these statements only to indicate some of the viewpoints held on this issue.

[110] *The FCC's Multiple Ownership Rules and National Concentration in the Commercial Radio Industry, supra* note 71, at 33. Diversity, the Court of Appeals for the D.C. Circuit has stated, is "an elusive concept entitling [the Commission] to rely on its own judgment." *National Association for the Advancement of Colored People v. FCC, supra* note 49, at 1001.

52. In examining this issue, it is important first to clarify the nature of the goal sought to be achieved. A major purpose of the First Amendment is the furthering of political discourse so that debate on public issues may be "uninhibited, robust, and wide-open."[111] National ownership rules, as the Commission has previously observed, cannot directly further the diversity of voices in a given community, because they do not govern such matters.[112] Thus, the leading concern of the Commission's national ownership rules has been with the furtherance of the First Amendment values in national political discourse,[113] and with the role of group owners as "gatekeepers" governing the flow of that discourse.[114]

53. If the market is thus, for diversity purposes, that for national issue-oriented information output, it would appear to include, at the least, all sources of real-time programming, including radio, which provide such information, as well as daily newspapers covering national issues.[115] In some circumstances, the 10,000 magazines published in this country should also be included,[116] as should available information data base systems. It would appear that, when considering diversity of viewpoint, the appropriate concern is with information availability, not with market share.

54. There are, however, a number of alternative perspectives from which to approach this matter. As we have indicated in para. 52, consideration of the First Amendment values inherent in national political discourse carries a concern as to the number of "gatekeepers" involved. Thus, it may be appropriate to analyze the "gatekeeping" function of group owners in conventional broadcast-

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[111] *Buckley v. Valeo*, 424 U.S. 1, 14 (1976), citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). See, also, *National Association of Theatre Owners v. FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

[112] *Amendment of Section 73.636(a) of the Commission's Rules (Multiple Ownership of Television Stations), supra* note 49, 75 F.C.C. 2d at 591.

[113] *Id.*, at 593.

[114] J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets, supra* note 70, at 5–6. We observe that analyzing today's diversified group ownership in this manner takes us somewhat beyond the concerns of many of the authors of our communications laws, whose fears were that a few individuals or "a single selfish group" might place "American thought and American politics" at their mercy through monopoly control of broadcast facilities. See, for example, *Print and Electronic Media, supra* note 51, citing the remarks of Rep. Johnson of Texas, 67 Cong. Rec. 5557, 5558 (1926).

[115] National television news programs are reported to have had a significant impact on afternoon newspapers in some markets. The various media are said to compete for the time the consumer has to receive the information he or she desires. That is, they are substitutes in the provision of such information. W.H. Read, *The First Amendment Meets The Second Revolution* (Harvard University Program on Information Resources Policy) (1981), at 10, citing *Note on the Newspaper Industry*, Case No. 4–376–082 (Harvard Graduate School of Business Administration) (1975). See, also, *Multiple Ownership, supra* note 92.

[116] J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets, supra* note 70, at 93–94.

ing and other sources of real-time programming, as well as newspapers and magazines.[117] Considerations regarding the role of group owners as "gatekeepers" are complicated by the fact that while the owner can, in a sense, be seen as a "national" firm, the information with which we are concerned, even though it deals with national issues, is being delivered locally. Each station and newspaper, for example, has its own staff. Locally-originated newscasts and print stories deal with national issues, and local news editors have the authority to select and edit information being distributed by national sources. There is no reason to presume in every case that these local editors undertake such tasks in lockstep precision under the control of their group owners. In fact, a recent study by the Ethics Committee of the American Society of Newspaper Editors ("ASNE") indicates that group editors enjoy substantial editorial independence.[117A] Therefore, absent evidence to the contrary, it may well be that these outlets of national information should be seen as quasi-independent, if not truly independent, information sources. Comment on this approach is solicited. The Commission specifically requests comment as to any evidence that either local or national news which is locally originated by group-owned stations represents the group's "monolithic viewpoint."

55. A somewhat related approach to the issue is suggested by the OPP staff, which argues that the relevant context for diversity considerations is the local market, because "[t]he range of choices available to viewers depends on the number of outlets available at the local level." Multiple ownership of outlets in separate markets does not limit that range. The OPP staff observes that as the consumers of ideas must get information through local outlets, so the speakers (producers of ideas) must have those ideas delivered through local sources. Information on national issues must be distributed locally and therefore, OPP contends, "the national program delivery market is nothing more than a collection of local markets." Thus, OPP argues, as it does with regard to economic concentration, that if all local markets were competitive, there would be no need for national or regional ownership rules. "Only within the set of non-competitive local markets might non-local ownership rules be appropriate."[118]

56. The OPP staff states that there is no precise boundary

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[117] In television and radio, the percentage of group-owned stations has remained relatively constant since the 1960's. During the same period, the total number of stations, the number of independent stations, and the number of group-owned stations have all increased. As the total number of stations has increased, so has the dispersion in the sources of information available throughout the nation.

[117A] Ethics Committee of the American Society of Newspaper Editors, *News and Editorial Independence: A Survey of Group and Independent Editors* 12–15 (April, 1980).

[118] J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets, supra* note 70, at 5–8.

between "competitive" and "noncompetitive" markets. It has, however, presented illustrative calculations showing the consequences of different assumptions regarding the number of independent voices within a local market that are needed for it to be defined as "competitive." Under this approach, national ownership regulations to limit multiple ownership in "noncompetitive" markets might be considered, but the OPP staff states that in doing so the Commission should take account of the costs such regulations impose in limiting combinations which increase efficiency. We request comment on the analysis done by OPP.

57. The Commission notes that while the discussion of diversity of viewpoints has thus far focused on national political discourse, the Supreme Court has repeatedly held that entertainment is entitled to First Amendment protection.[119] If entertainment is considered as part of of the information as to which the Commission actively has diversity concerns, the market likely should be viewed to include information transmission from video cassettes and discs, records and tapes, and, perhaps, movies, theater and related events. The Commission solicits comment on this point, with attention to the implications of *FCC v. WNCN Listeners Guild*[120] in these considerations.

58. An issue which is fundamental to the Commission's consideration of diversity is the relationship between diversity of ownership and diversity of viewpoint; that is, "whether maximum dispersion of *ownership* of media outlets is necessary for the widest dissemination of information from diverse *sources*."[121] The First Amendment, as Alexander Meiklejohn has stated, "is not the guardian of unrelated talkativeness. It does not require that on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have the opportunity to do so . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said."[122] While all rules limiting ownership tend to increase the total number of owners, "such rules do not

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[119] See, for example, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932–933 (1975); *Winters v. New York*, 333 U.S. 507, 510 (1948). "Literature and the arts must be protected by the First Amendment. They lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created." A. Meiklejohn, *The First Amendment Is An Absolute*, 1961 The Supreme Court Review 245, 256–257 (1961).

[120] *Supra* note 70. As an additional related factor, we note that in a recent study more than one-third of all surveyed households owning video games reported a decline in television viewing since the games were purchased. Benton & Bowles, Inc., *The New TV Technologies: The View From The Viewer — II* (May, 1983), at 44. Given the apparent use of these games as a television entertainment substitute, it may be appropriate to include game cartridges in the relevant market.

[121] *Amendment of Part 76, supra* note 96, at para. 24.

[122] A. Meiklejohn, *Free Speech And Its Relation to Self-Government* 25 (1948).

necessarily guarantee greater diversity of program content or advance the welfare of individual viewers . . . Whether that occurs depends, *inter alia*, on the costs which the rules impose . . ."[123] We have observed, at paras. 37–39, *supra*, that in the instant matter these costs may include a reduction in the diversity of programming which would otherwise be available due to the inability of station owners to benefit from the program production and distribution opportunities which the efficiencies of group ownership facilitate. As we have noted, a key factor which must be considered is whether the diversification-maximizing action would hinder "the best practicable service to the American public," or otherwise be outweighed by other public interest considerations. It is possible that if the Commission, modifies its rules to allow the potential efficiencies inherent in group ownership to be realized, the resources devoted to program development will provide more original programming than is presently available. There may be greater diversity of views in the programming made available by strong group owners than in the repetitive fare which may otherwise be available.[124] Comment on this point is requested.

59. A final aspect of our consideration of diversity of information sources is examination of the role of the three major networks and other nationwide information delivery systems. Each of the networks, with its affiliates, can reach virtually all of the 83 million television households in the nation. Network programming remains a dominant factor in prime time viewing patterns. Allowing the networks to purchase additional stations might well increase the difficulty which other broadcast operators would have in assembling groups and informal "networks" large enough to foster new video programming. Our belief that such programming advances might flow from relaxation of the seven station standard is one of the motivating forces in our initiation of this proceeding. We therefore request comment as to whether an alternative regulatory scheme should apply to network acquisition of additional stations. The potential alternative limits include maintaining the present seven

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[123] *Amendment of Part 76, supra* note 96, at para. 24.

[124] See, for example, *Amendment of Sections 73.35 and 73.240 of the Commission's Rules Relating to Multiple Ownership of AM and FM Stations*, 51 R.R.2d 449, 451–452 (1982), *aff'd. mem. National Association for the Advancement of Colored People v. FCC*, No. 82–1681 (D.C. Cir. March 31, 1983). See, generally, J.D. Levy and F.O. Setzer, *Measurement of Concentration in Home Video Markets, supra* note 70, at 19–32. Evidence from the newspaper business is that in a majority of the cases, a new group owner increases the paper's spending for news coverage and equipment, and that in a significant proportion of the cases the amount and quality of coverage improves. Coverage of national politics increases in almost half the cases. Ethics Committee of the American Society of Newspaper Editors, *News and Editorial Independence: A Survey of Group and Independent Editors, supra* note 117A, at 17.

station ceiling and creating a new ceiling based on net weekly circulation or reach of owned stations.

60. In this regard, the Commission also solicits comment on the substitutes to network product distribution available in the information delivery market. We note, for example, that if our concern is national political discourse, the numerous radio networks would appear to be a delivery substitute. The national wire services serve broadcast outlets and print media around-the-clock. The national news services operated by such newspaper group owners as Gannett also constribute to the relevant market.[125] Cable News Network ("CNN") and Satellite News Channel ("SNC") appear to compete directly with the networks. If the market for information is looked at more broadly, such video alternatives as C-Span and Cable Health Network may also be included, as might the information distributed by many of the approximately 170 national syndicate services.[126] Expanding our consideration to encompass total programming diversity adds all nationally distributed entertainment programming, from whatever source, so long as such programming increases the voices available to the consumer. The Commission requests comment on the relationship between the "seven station rule" and the national information market, the appropriate parameters of that market to be considered, measures of market share and concentration, and such other and related factors as may be relevant to this proceeding.

61. It is the Commission's intent, at the conclusion of this proceeding, to reduce our national broadcast ownership restriction, the "seven station rule," to the maximum extent feasible consistent with the record developed herein. Thus, assuming the record indicates that the relevant markets are sufficiently competitive from the appropriate perspectives, the rule will be eliminated. It is clear, however, that a range of alternatives present themselves, including separate consideration of radio and television, separate treatment of network ownership, and adoption of the restrictions which the OPP staff analyzed regarding ownership across "noncompetitive markets."

62. As we have noted, the issue of "how much diversity of information is enough" is particularly difficult to resolve. Thus, it may be that as an interim step in its deregulatory efforts, the Commission would choose to significantly increase, rather than

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[125] Many of the approximately 70 "news services, news picture companies and newreel companies" identified in *The Working Press of the Nation* might also qualify. *The Working Press of the Nation, Newspaper Directory*, at Section 11 (1982).

[126] *Id.*, at Section 12.

totally remove, the ceiling on the number of stations which can be owned by one entity.[127] In a paper on the topic of national ownership concentration in radio, prepared for the National Association of Broadcasters ("NAB"), Dr. Michael Wirth of Denver University examines seven policy alternatives: (1) keep the present rule; (2) modify the present standard to permit ownership of 14 radio stations without regard to type (AM or FM);[128] (3) modify the standard to allow one entity to own the same percentage of commercial stations nationally at present "as they were allowed to do in 1953," which would permit ownership of 36 radio stations regardless of type; (4) modify the standard to allow one entity to own the same percentage of commercial radio stations nationally as seven commercial television stations is of the total number of commercial television stations, which would permit ownership of 72 radio stations without regard to type; (5) eliminate all arbitrary standards, and consider each case separately to determine if that group's newest purchase is in the public interest; (6) use the Justice Department merger guidelines to determine when a station merger would not be in the public interest; and (7) limit national ownership via a population standard similar to that proposed by Senators White and Bricker.[129]

63. Dr. Wirth's recommendation is that the Commission adopt policy alternative (3), permitting any entity to own 36 radio stations regardless of whether they are AM or FM. This would allow ownership of the same percentage of the total number of commercial radio stations as one was permitted to own when the "seven station rule" was adopted in 1953. Dr. Wirth concludes that permitting this amount of ownership "cannot possibly create unlawful concentration in the national media market," and "will maintain an efficient method for dealing with national media market concentration issues." However, he recommends that the Commission "not view this new standard as unwaivable," since "[f]ailure to ever waive what is admittedly an arbitrary standard is the ultimate in administrative inflexibility, particularly in a dynamic marketplace."[130]

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[127] Adoption of the alternative discussed by the OPP staff regarding treatment of "noncompetitive" markets is, as we have indicated, also one of the alternatives.

[128] This approach has also been suggested by Doubleday Broadcasting Co., Inc., *supra* note 56, whose related *Petition for Rule Making* is hereby incorporated in this proceeding. In accordance with §1.3 of the Commission's Rules, §§1.403 and 1.405 are hereby waived for this purpose.

[129] M.O. Wirth, *The FCC's Multiple Ownership Rules and National Concentration in the Commercial Radio Industry*, *supra* note 71, at 31–32. Comparisons based on the number of commercial stations in 1981. A copy of the Wirth paper will be placed in the docket.

[130] *Id.*, at 33. As noncommercial stations are among the competing voices in the marketplace, the commercial/noncommercial distinction made by Wirth may be inappropriate. If that is the case, the permissible number of stations today would be 41 (based on 1983 data). We solicit comment on this alternative.

64. Dr. Wirth rejects alternatives (1) and (2) as unduly restrictive. Alternative (4), which would set a 72 station ceiling, "is rejected only because it would allow for such a large increase in national radio ownership without prior experience," but future consideration is recommended. Wirth rejects alternative (5) — case-by-case consideration, and (6) — antitrust-type review, because of the administrative inefficiencies and uncertainties at the Commission and in the industry which he concludes they entail. He discards alternative (7), the population percentage approach, due to the administrative difficulties which would be involved.[131] We solicit comment on the Wirth approach. While increasing the ownership limits to the level suggested by Wirth may alleviate the need to consider such matters directly, commenters are requested to discuss whether conditions should also be placed on such factors as the number of stations of any class which might be owned or the total population or geographic area served by one entity.

65. The proposals made by Dr. Wirth and by Doubleday are transferable to the situation in television. Given the progress made toward UHF comparability, the Commission could choose to act in a manner similar to that which Doubleday proposes and eliminate the UHF/VHF distinction in the "seven station rule" as an initial step in revising our rules. If we treat the expansion of on-air television stations in the same manner Dr. Wirth has suggested we handle radio, a single entity would be permitted to own 14 television stations of any class, based on the number of commercial stations broadcasting when the seven station television limit was established in 1954 compared to the number licensed in 1983. As to the 14 station limit, we request comment as to whether component restrictions on such factors as the population or geographic area served should also be adopted.[132]

66. The Commission recognizes that there are inherent weaknesses in any regulatory approach based on numbers, population, or geographic area. It is our desire, should we determine to adopt such a standard, that we reduce insofar as possible the arbitrary nature of the measure in question. Parties are therefore encouraged to discuss in detail the steps they believe might be useful to the Commission in adopting as just and equitable a standard as is possible consistent with policy objectives and the requirements of the Communications Act and any relevant case law.

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[131] *Id.*, at 33–34.

[132] If the commercial/noncommercial distinction is eliminated and 1954 is the base year, the number of stations permitted would be 19. If 1953 is used as the base year (and noting that only five TVs were permitted at that time), the number of stations now permitted would be 21. This number would increase to 28 if noncommercial stations are included in the base. We solicit comment on these alternatives.

IV. *Administrative Matters.*

67. Authority for this proposed rulemaking is contained in Section 1, 3, 4(i) and (j), 303, 313 and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in §§1.415 and 1.419 of the Commission's Rules interested parties may file comments on or before *December 19*, 1983, and reply comments on or before *January 18*, 1984. All relevant and timely comments will be considered by the Commission before the final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

68. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contacts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. §1.1231.

69. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis ("IRFA") of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix "A". Written public comments are request on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including

the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 50 U.S.C. §601 et seq.) (1981).

70. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For information on this proceeding, contact Steven A. Bookshester, Office of General Counsel, (202) 254–6530.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX "A"

Initial Regulatory Flexibility Analysis

1. *Reason for Action.* The Commission believes that its rules and policies should be reviewed in the context of current social, technological and financial environments in which licensees and applicants operate, so that service to the public may be facilitated while the least regulatory cost is imposed. It is in this light that it is considering modification of the "seven station rule."

2. *The objectives.* The Commission proposes to modify the "seven station rule" in the light of changes in telecommunications, reducing regulation to the maximum extent feasible, and taking such action in a manner consistent with the objective of enhancing diversity in broadcasting. The Commission believes that such action may lead to additional production and distribution of broadcast programming, and may also facilitate the development of new over-the-air networks.

3. *Legal basis.* Action proposed herein is taken pursuant to Sections 1, 3, 4(i) and (j), 303, 313, and 403 of the Communications Act of 1934, as amended.

4. *Description, potential impact and number of small entities affected.* The proposals set forth herein would modify the seven station per service ownership limitation presently imposed on broadcast licensees. A substantial number of existing licensees and potential new entrants are small entities. The action would be expected to have an immediate impact upon only a limited number of entities, as few station owners presently are at or near to holding the maximum number of licenses in any service. Over a period of time, the number of such entities would be expected to expand. Relaxation of the rule may facilitate the ability of small businesses to obtain new investment capital from investors desiring equity participation in an enterprise (which is generally treated in the same manner as a controlling interest for purposes of the numerical limit), and may allow small entities to enter program production and related areas through realization of the efficiencies to be found in larger enterprises. The Commission cannot ascertain the impact, if any, which such a freeing of the market might have on station prices due to activity by larger existing enterprises purchasing stations in certain market segments. Other small entities which might be affected include station brokers, (approximately 50), those involved in the financing of

broadcast stations (number unascertainable), and suppliers to broadcast stations (number unascertainable). Turnover of stations and new station start-ups may create new or additional business, or client changes, for these entities.

5. *Recording, record keeping and other compliance requirements.* The proposed change would reduce such requirements.

6. *Federal rules which overlap, duplicate or conflict with this rule.* None. Although antitrust enforcement by the Federal Trade Commission and the Department of Justice is also concerned with precluding monopoly in telecommunications, the FCC does not enforce the antitrust laws. Rather, it presently takes such concerns into account in its regulation under the public interest standard.

7. *Any significant alternatives minimizing impact on small entities and consistent with the stated objective.* None.

APPENDIX "B"

The "Seven Station Rule"

(*Sections 73.35(b)(1) [AM], 73.240.(a)(2) [FM], and 73.636(a)(2) [TV] of the Commission's Rules*)

"No license for an AM [FM] [television] broadcast station shall be granted to any party (including all parties under common control) if such party, or any stockholder, officer or director of such party, directly or indirectly owns, operates, controls, or has any interest in, or is an office or director of any other AM [FM] [television] broadcast station if the grant of such license would result in a concentration of control of AM [FM] [television] broadcasting in a manner inconsistent with the public interest, convenience, or necessity. The FCC however, will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers, or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than seven AM [FM] [television] broadcast stations, [no more than five of which may be in the VHF band] . . ."

DISSENTING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Notice of Proposed Rulemaking Regarding Amendment of the Multiple Ownership Rules.

I dissent to this reexamination of the "seven station rule".[1] The philosophy and objectives set forth in this Notice represent a reversal of the FCC's long-held approach to media ownership diversification that has profound implications.[2] That approach, which I endorse, holds that the public interest lies in the widest possible dissemination of ideas from diverse and antagonistic sources, and that this public interest is best achieved by maximum diffusion of media ownership and control. As Judge Learned Hand so aptly put it: "The First Amendment pressupposes that the right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[3] The majority now suggests that the public interest in diverse sources of opinion may be better achieved by a policy whose hallmark is the antithesis of maximum diffusion of ownership—media ownership conglomeration. I find no support for such a radical rethinking of the structural diversity policy; no urgent need to change these rules drastically; and no alternatives short of outright repeal sincerely considered in the Notice. Conversely, the prospective detriment to established diversification and minority ownership policies is patent. Therefore, I simply cannot support the issuance of this rulemaking notice.

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[1] *See* 47 C.F.R. §§73.35(b)(1) [AM], 73.240(a)(2) [FM], 73.636(a)(2) [TV].

[2] The Notice is confined to the seven station rule. However, various aspects of the discussion have implications for other ownership rules and policies as well. *See, e.g., Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965) (setting maximum diffusion of mass media control as a licensing goal of primary significance); 47 C.F.R. §§73.35(b)(1) [AM]; 73.240(a)(2) [FM]; 73.636(a)(2) [TV] (regional concentration rules). *See also Broadcasting Magazine*, "Broadcasters urge FCC regional concentration limits be lifted," (Sept. 26, 1983) p. 58.

Who can argue that the present rules are not arbitrary? Not I. Different seven station groups reach different percentages of the population depending on where the stations are located. This arbitrariness has been recognized since their promulgation. However, the lack of perfection in these rules is a price the FCC has long been willing to pay in exchange for the public benefits accruing from maximum diversification of ownership and viewpoint in broadcasting. That the rules have permitted uneven results does not diminish the fact that they have prevented concentration of the broadcast media in the hands of a few powerful companies.

The simple truth is that this rulemaking contemplates regulatory and philosophical changes far too sweeping, and with too much potential for harm, for me to support it in good conscience. And it embarks on this venture on its own motion rather than in response to any general public or industry claim that a change is needed. Indeed, the only concrete public benefit cited by the Notice in support of eliminating or liberalizing the seven station ruling—the likelihood that additional networks and new program production will result—is unconvincing. According to the majority, the seven station rule may undermine programming diversity by preventing group owners from reaching a percentage of the population comparable to that reached by the major networks through their owned stations. The limitation, it is argued, deters production of "quality" programming and the formation of additional full-time or part-time networks by curtailing the production and distribution efficiencies possible from such expanded group ownership.

There is no evidence that the rule has had this effect. As an initial matter, the number of households reached by some group owners through their broadcast stations has approached that of the network-owned stations for some time, thereby giving them a station ownership stake comparable to the networks. Until recently, however, those owners have not launched sizable programming ventures. If the majority's argument (that ownership penetration equivalent to that of the network-owned stations provides the economic base necessary for the creation of new networks) were valid, one would have expected these group owners to have launched sizable programming ventures some time ago. In fact, it is widely recognized that the most significant limitation on the creation of additional networks is the 1952 *Television Table of Allocations*, which limits the number of VHF television stations in most markets to less than four. The *Network Inquiry*, in examining regulatory alternatives that might lead to the formation of additional networks, identified spectrum allocations for DBS and MDS as promising routes and the Commission has implemented those recommendations. Now, with the advent of cost-effective satellite distribution technologies (and contrary to the majority's notion that the seven station rule inhibits group owners from producing programming) group owners are, in fact, beginning to launch nationwide programming ventures, in the terrestrial television service.[4] Similar developments exist in radio, where numerous programming networks now exist. In sum, it is far from apparent that expanded group ownership of television stations is necessary to promote additional diversity of program sources or the development of new networks. Surely, a more persuasive case should have been made to support so radical a departure from the FCC's traditional approach to media diversity.

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[3] *United States* v. *Associated Press*, 52 F.Supp. 362, 372 (S.D.N.Y. 1943), *aff'd* 326 U.S. 1 (1945).

While expansive as to the program diversity benefits of increased combined ownership and the competitive advantages to existing group owners, the Notice shows little regard for the impact the proposed rule changes will have on ease of entry by newcomers to broadcasting — minorities and non-minorities alike — and upon the diversity that now exists in the industry. Prior congressional and FCC initiatives have strongly emphasized the importance of diversifying the pool of broadcast owners.[5] Elimination or substantial relaxation of the seven station rule is likely to seriously impair entry and participation by all but very large media conglomerates, contrary to this well-founded policy. This is so because in the new, post-rule environment, these conglomerates will bid up the prices of stations in most markets significantly. So far up, in fact, that new entry by those with more limited resources will be all but impossible.[6] The expanded presence of group owners will also make it more difficult for small broadcasters to compete.

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[4] Furthermore, a host of cable programming networks have blossomed without substantial ownership of distribution outlets.

[5] *See, e.g.,* 47 U.S.C. §309(i)(3)(A) (mandating significant preferences to diversify mass media); H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 40–45 (1982) (recognizing "nexus between diversity of media ownership and diversity of program sources" and specifying that traditional diversification objectives be promoted in mass media lottery grants); *Policy Statement on Minority Ownership of Broadcast Facilities,* 69 FCC 2d 1591 (1978); *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965). *See also Associated Press* v. *United States,* 326 U.S. 1, 20 (1945) (First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ").

This Adam Smith approach to broadcast regulation may be unobjectionable for industries not characterized by technical scarcity, and not affected with a nearly unique capacity to influence public opinion. However, rigid reliance on the free market philosophy is extremely hazardous in the sensitive domain of broadcast ownership and expression. The FCC's Advisory Committee on Alternative Financing for Minorities in Telecommunications appreciated these concerns when it concluded that "abrupt removal [of the ownership rules] could result in greater market dominance by established entities, less diversity and fewer opportunities for new entrants into broadcast ownership, including minorities. The Commission cannot be blind to the restructuring consequences of deregulation."[7] If not altogether blind to these consequences, this Notice, at the very least, is myopic.

Given that media diversification could be seriously undermined by substantial alteration of the existing seven station rule, any proposals for change should have been carefully considered, cautious, and justified by significant countervailing benefits to the public. However, such significant public benefits are not apparent from the new analytic approach to diversity and competition expounded by the majority. In addition, the Notice holds out little prospect for final action in this proceeding short of outright repeal of these rules.[8]

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[6] The Notice's suggestion that relaxation or elimination of the rule will prove *beneficial* to minority ownership strains credibility. Only a handful of existing minority broadcasters could be in a position to benefit from these proposed rule changes. And if the Commission were interested in facilitating investment in new minority enterprises, it need only have modified the ownership attribution rules to facilitate such investment, instead of opening the ownership rule floodgates altogether. *See Corporate Ownership and Reporting and Disclosure by Broadcast Licensees*, 48 Fed. Reg. 10082 (March 10, 1983), (Joint Concurring Statement of Commissioners Henry M. Rivera and Joseph R. Fogarty, at Note 1).

[7] *Final Report* at 1-2 (*Strategies to Advancing Minority Ownership in Telecommunications*) (1982).

[8] As for promoting economic competition, the Notice proposes that the Commission defer to other agencies or develop various media concentration indices. Ultimately, the Notice questions the utility of such measures, observing that "it may well be necessary to resolve this proceeding based on the limited question of whether the degree of competition in television and radio is sufficient, and the potential anti-competitive impact sufficiently remote, to support elimination or modification of the rule." *See* para. 46. As for maximizing diversity of viewpoint, the majority regards the task of deciding how much diversity is enough as highly difficult, and accordingly encourages reevaluation of the philosophy that maximum ownership

Although comment on alternatives to repeal is solicited in the Notice's concluding paragraphs, when these options are considered in light of the majority's "new analytic perspective," it is hard to credit them as truly possible outcomes in this proceeding.[9]

If any rationalization and revision were in order, it should have been accomplished in phases to provide experience about the public interest impact of changing the rules. One such approach would have been to reexamine the aggregate ownership limits in radio, where a persuasive changed-circumstances argument can be made. In radio, the public has the benefit of well over 9,000 outlets. Only 27 percent of these stations are owned in groups of three or more. Thus, ownership in radio is diffused over a broad range of owners and a large number of outlets, and some modification of the present ownership limits is unlikely to undermine the diversification policy. In these circumstances, I could have supported an inquiry focussing solely on radio.

The case for changing the rule for television is much weaker, and the consequences of a policy misstep far more severe. Television is the dominant information and entertainment medium for most Americans. Therefore, any attempt to restructure ownership patterns in the medium should be executed with care. Television is not characterized by the abundance and ownership diversity that exists in radio. There are scarcely over 1000 outlets. Approximately 72 percent of the 790 commercial stations are held by group owners.[10] The Notice indicates that by accepted measures of concentration, television is an unconcentrated industry. However, ownership patterns and economic measurement tools that may be perfectly appropriate for industries involving steel, breakfast cereal, or appliances should be regarded with caution in the sensitive field of information dissemination.[11] The concentration index approach

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dispersion produces maximum dispersion of viewpoint. Such surgical parsing of the goals underlying the Commission's ownership rules is academically interesting, but does little to advance the analysis of whether and, if so, how to revise the rules. Of course, if elimination of the rules is the overriding objective, this technique may not be inappropriate.

[9] An additional insight as to the likely outcome in this rulemaking is provided by the majority's explicit intent to reduce the rule "to the maximum extent feasible . . . ." *See* para. 61. The Notice's failure to consider the impact of the pending attribution rulemaking — which would elevate ownership benchmark to as much as 20 percent — upon the alternatives advanced further suggests that this proceeding may well be an exercise in predetermination. *See generally Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 48 Fed. Reg. 10082 (March 10, 1983).

[10] Television is undeniably facing increasing competition from cable, but the extent and continued growth of that competition is unclear. Furthermore, while other video services are beginning to emerge, they have yet to achieve any appreciable market share in the national video market. Therefore, fundamental alteration of the television ownership limits is premature.

[11] Judge Hand put it nicely when he said: "[I]f this were a case of the ordinary kind: the production of fungible goods, like steel, machinery, clothes or the like, it

explored in the Notice, if ultimately adopted, would allow for the placement of numerous television outlets under the editorial control of a limited number of entities. This prospect is fundamentally at odds with the First Amendment goals so long espoused by the Judiciary, Congress and this Commission.

Since only a handful of companies own the full complement of seven television stations, as a practical matter, postponing review of the television ownership ceiling would have caused very little burden to the industry. At the same time, postponement would have afforded more time for the new media to develop, and perhaps with that development would have come greater diversification of the video market. Postponement would also have given the FCC a chance to evaluate the public interest impact of liberalizing the radio ownership rules.

Ordinarily, at the commencement of a rulemaking, dissatisfied segments of the public can take some comfort in the fact that a range of different outcomes is possible and that all viewpoints persuasively expressed in the comments will be seriously considered. In this instance, given the majority's explicit inclination toward major restructuring of these rules, there is little reason to expect anything else unless the majority can be prevailed upon to temper its approach. Because this Notice sets the FCC on a path calculated to undermine the diversity of ownership and viewpoint in broadcasting so faithfully nurtured for decades, I must dissent.

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would be [a different matter] . . . However, . . . [the press] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible." *United States* v. *Associated Press*, *supra*, 52 F.Supp. at 372.

Comparative Hearing
Diversification, of Control of Mass Media
FM Station, Authorization
Review by Review Board

Review Board affirms Initial Decision and grants FM applicant meriting substantial diversification preference which outweighs competing applicant's substantial integration preference. Losing applicant is licensee of the only broadcast (daytime-only AM) station in proposed community; some of winner's stockholders have ownership interests in radio stations in same state, 75–130 miles away.

–Multiplex Communications, Inc.
BC Docket No. 82–411

FCC 83R–60

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
MULTIPLEX COMMUNICATIONS, INC. Buckhannon, West Virginia	BC Docket No. 82–411 File No. BPH-810407AA
RADIO STATION WBUC, INC. Buckhannon, West Virginia	BC Docket No. 82–412 File No. BPH-810227AB
For Construction Permit for a New FM Station	

Appearances

Mark E. Fields on behalf of Multiplex Communications, Inc.; and *Harry G. Sells* on behalf of Radio Station WBUC, Inc.

DECISION

(Adopted: August 23, 1983; Released: August 30, 1983)

BOARD CHAIRMAN MARINO FOR THE REVIEW BOARD:

1. This comparative case involves the competing applications of Radio Station WBUC, Inc. (WBUC) and Multiplex Communications, Inc. for a new FM broadcast station in Buckhannon, West Virginia. WBUC excepts to the Initial Decision of Administrative Law Judge

Byron E. Harrison, released May 9, 1983 (FCC 83D-29), granting the application of Multiplex. There has been no request for oral argument and we have not deemed one necessary or useful. In essence, we affirm the ALJ's comparative choice because Multiplex is entitled to a diversification preference over WBUC which already owns a broadcast station in Buckhannon, para. 5 below, and this preference outweighs WBUC's preference for participation of ownership in management. Para. 7 below.

2. *Participation of Ownership in Management*. WBUC received a preference for integration of ownership and management based on the pledge of Jesse D. Newman, the 100% owner of WBUC, to work full time at the proposed FM station. Multiplex was awarded 30% quantitative integration credit because Bruce F. Tenney, a 30% stock subscriber, will be the only Multiplex principal involved in the day-to-day operation of the proposed station. *I.D.*, Findings, paras. 9, 12. We adopt these findings and conclusions and note that there is no exception taken to the preference awarded, which is substantial. *See Superior Broadcasting of California*, FCC 83R-52, released July 25, 1983; *Muncie Broadcasting Corp.*, 81 FCC 2d 123, 134 (Rev. Bd. 1982). There is no need for further consideration of this point.

3. *Diversification of Control*. Multiplex has five stockholders, four of whom have other broadcast interests. Specifically, Tommy L. Kuhn, a 30% stockholder, is majority owner of AM Station WXEE, Welch, West Virginia, located approximately 130 miles from Buckhannon; Curtis E. Durst and Jack I. Mullen, II, 10% stockholders, and Jack I. Mullen, a 20% stockholder, are stockholders of the parent corporation of Stations WKLP-AM and WQZK-FM, Keyser, West Virginia; and Durst is general manager and Jack I. Mullen, II is chief engineer and program director of Stations WKLP-AM and WQZK-FM. Keyser, West Virginia is located approximately 75 miles from Buckhannon. On the other hand, WBUC is the licensee of a daytime-only AM station in Buckhannon, the principal city to be served by the proposed FM station. Mr. Newman is the 100% owner of both the WBUC applicant and existing AM broadcast Station WBUC in Buckhannon, the only commercial broadcast station licensed to that community. *I.D.*, Findings, paras. 7–8.

4. WBUC excepts to Judge Harrison's conclusion that: ". . . far more significant here is the fact that Mr. Newman already owns a broadcast station in the community of license. Thus, a substantial preference must be accorded to Multiplex since it would create a new and competing broadcast voice in Buckhannon, whereas a grant of WBUC would not." *I.D.*, Conclusions, para. 2. Instead, WBUC asserts that granting the application of Multiplex "creates a regional concentration of control of the mass media in the State of West Virginia." Br. at 7.

5. The law is well-settled that diversification is an objective of primary significance in determining which applicant shall prevail

under the standard comparative issue. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965). In choosing between competing applicants, the Commission considers ownership interests in existing stations to be most significant when located in the principal community proposed to be served, followed by those located in the remainder of the service area, and then by those generally in the United States. *Id.* WBUC operates a daytime-only AM station in Buckhannon, the principal community to be served. Multiplex's interests are located outside the service area of the proposed station, but within communities in the state of West Virginia, the closest of which is 75 miles away. WBUC's ownership of AM Station WBUC in Buckhannon is, therefore, most significant because it originates in the proposed service area. To grant WBUC's application would create a broadcast monoply in Buckhannon, contrary to the Commission's policy to encourage competing broadcast voices within a community. *See Brownfield Broadcasting Corp.*, 53 RR 2d 1175 (Rev. Bd. 1983); *Hassayampa Broadcasting*, 52 RR 2d 1059 (Rev. Bd. 1982), *rev. denied*, FCC 82–295, released June 28, 1983. Buckhannon presents a classic illustration of the need for competing broadcast stations: there is a single AM daytime-only commercial radio station and no television station.

6. We also reject WBUC's contention that to affirm the Initial Decision "allows a regional concentration of control of the mass media to result." Br. at 9. First, even if this allegation were proved, it would not necessarily provide WBUC with a diversification preference because, as previously explained, local mass media interests in the community of license are normally more significant than regional or national ones particularly where, as here, the local interest is the only existing commercial broadcast station. Second, in considering other stations and the question of regional concentration, the following factors must be considered: the degree of control or ownership a potential licensee exercises in other mass media; their significance in terms of size of audience; their significance in terms of regional or national coverage; and their significance with respect to other media in the respective localities. *Policy Statement, supra*, 1 FCC 2d at 394–5. The Multiplex principals who have other broadcast interests control only 30 percent and 40 percent, respectively, of Multiplex, and only Mr. Kuhn has a controlling interest in one of the three stations. Thus, these regional media interests are not concentrated in a controlling stockholder of Multiplex, nor are they interconnected in such a way as to create a controlling ownership over the three existing stations and one proposed station. Finally, WBUC has made no showing whatever with regard to the other important factors indicated above and thus, despite its allegation to the contrary, has not provided evidence that the Multiplex interests amount to a substantial concentration of control of the media on a regional scale. Nevertheless, Multiplex's limited (3)

and distant (75 to 130 miles away) media interests will be considered in our overall comparison of the two applicants and weighed against WBUC's local monopoly. After doing so, we conclude that those interests do slightly diminish Multiplex's diversification preference which remains substantial. *Communications Properties, Inc.*, 92 FCC 2d 45, 52 RR 2d 981 (Rev. Bd. 1982), *rev. den.* FCC 83–320, July 7, 1983. *Cf. Thomas C. and Essie L. Collins*, 53 RR 2d 219 (Rev. Bd. 1983); *Gilbert Group, Inc.*, 88 FCC 2d 401 (Rev. Bd. 1981)

7. *Summation.* WBUC has received a substantial preference for integration of ownership and management, and Multiplex has been awarded a substantial preference for diversification of control of the media of mass communications. The *Policy Statement, supra*, has two primary objectives, best practical service to the public and diversification of control. 1 FCC 2d at 394. Thus, Multiplex's substantial preference for diversification, which is one of these twin objectives, outweighs WBUC's preference for intergration, which is only one element of best practicable service. *See KBBS, Inc.*, 91 FCC 2d 115 (Rev. Bd. 1982); *Colorado West Broadcasting, Inc.*, 57 FCC 2d 526, 533 (Rev. Bd. 1976). In essence, the public will be best served by the licensing of a new broadcast voice in Buckhannon, and we therefore affirm the conclusion reached by the ALJ that the application for a new FM station in Buckhannon should be granted to Multiplex.

8. One procedural matter requires a brief coda in lieu of a footnote. Multiplex filed a motion to strike WBUC's exceptions because of noncompliance with Section 1.276(a)(2) of the Rules. Although we do not condone this shortcoming by WBUC, to strike its exceptions would unjustifiably delay this proceeding. Multiplex was not noticeably hindered or prejudiced in responding to WBUC's eleven page brief by WBUC's omission of a table of contents and citations in its exceptions. Dismissal under these circumstances is, therefore, not appropriate.

9. ACCORDINGLY, IT IS ORDERED, That the motion to strike exceptions, filed June 10, 1983, by Multiplex Communications, Inc., IS DENIED; and

10. IT IS FURTHER ORDERED, That the application of Multiplex Communications, Inc. (File No. BPH-810407AA) IS GRANTED and the application of Radio Station WBUC, Inc. (File No. BPH-810227AB) IS DENIED.

Federal Communications Commission
Joseph A. Marino, *Chairman, Review Board*

FCC 83D-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of MULTIPLEX COMMUNICATIONS, INC. Buckhannon, West Virginia	BC Docket No. 82-411 File No. BPH-810407AA
RADIO STATION WBUC, INC. Buckhannon, West Virginia	BC Docket No. 82-412 File No. BPH-810227AB
For Construction Permit for a New FM Station	

Appearances

Mark E. Fields on behalf of Multiplex Communications, Inc.; *Harry G. Sells* on behalf of Radio Station WBUC, Inc. and *Brian Kilbane* on behalf of Chief, Broadcast Bureau, Federal Communications Commission.*

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE BYRON E. HARRISON

(Issued: May 2, 1983; Released: May 9, 1983)

Preliminary Statement

1. This proceeding involves two mutually-exclusive applications for a new FM channel at Buckhannon, West Virginia. The applicants are Multiplex Communications, Inc. (Multiplex) and Radio Station WBUC, Inc. (WBUC).

2. Since only one of the mutually-exclusive applications may be granted, the Commission by *Hearing Designation Order*, BC Mimeo No. 5197 released July 19, 1982, designated this matter for hearing on the following issues:

(1) To determine whether there is a reasonable possibility that the tower height and location proposed by Radio Station WBUC, Inc. would constitute a hazard to air navigation;[1]

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* Now Mass Media Bureau.

[1] Issue 1 was resolved favorably to WBUC and summary decision granted on that issue, *Order* FCC 82M-3246 released October 19, 1982.

(2) To determine which of the proposals would, on a comparative basis, better serve the public interest; and

(3) To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

3. A prehearing conference was held on September 23, 1982. The hearing was held and the record closed on November 2, 1982.

4. Both applicants filed proposed findings of fact and conclusions of law on December 2, 1982 and December 3, 1982 and each filed optional reply findings and conclusions on December 17, 1982.

Findings of Fact

The Applicants

5. Multiplex is a West Virginia corporation. Its stock subscribers, officers and directors are:

Bruce S. Tenney	30%	President
Jack I. Mullen, II	10%	Vice President
Curtis E. Durst	10%	Secretary-Treasurer
Jack I. Mullen	20%	
Tommy L. Kuhn	30%	

(Multiplex Exhibit B).

6. WBUC is the licensee of Radio Station WBUC, Buckhannon, West Virginia. Station WBUC operates on the frequency of 1460 Kilohertz with power of 5,000 watts, daytime only. Mr. Jesse D. Newman is President, Director and 100% owner and stockholder of the applicant (WBUC Exhibit 4).

Ownership of Media of Mass Communications

7. Four of the five principals of Multiplex have other broadcast interests. Tommy L. Kuhn is President, Director and majority owner of AM Station WXEE, Welch, West Virginia, which is approximately 130 miles from Buckhannon. Curtis E. Durst, Jack I. Mullen and Jack I. Mullen, II are officers, stockholders and Directors of the parent corporation of Stations WKLP-AM and WQZK-FM (formerly WKLP-FM).[2] Curtis E. Durst is General Manager and Jack I. Mullen, II is Chief Engineer and Program Director of Stations WKLP-AM and WQZK-FM, Keyser, West Virginia. Keyser is approximately 75 miles from Buckhannon (Multiplex Exhibit A).

8. Jesse D. Newman, the 100% owner of WBUC, also owns AM broadcast Station WBUC—a daytime-only station at Buckhannon (WBUC Exhibit 4). WBUC is the only commercial radio or television

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[2] Station WQZK-FM filed an application on September 3, 1982 (File No. BPH-820903AJ) to increase the effective radiated power and antenna height. The application had not been granted as of the date of the hearing (November 2, 1982).

in Buckhannon. Buckhannon has no daily newspaper (Multiplex Exhibit A).[3]

Integration of Ownership and Management

Multiplex

9. Bruce S. Tenney, President, is a 30% stock subscriber of Multiplex and will be the only subscriber to participate in the day-to-day affairs of the proposed FM station. He will be in charge of operation of the station and will also be responsible for engineering (Multiplex Exhibit C; Tr. 21).

10. Mr. Tenney has had six months prior broadcast experience as a radio station employee at WKLP/WQZK, Keyser. Though classified as Assistant Engineer, he also did some broadcast announcing, commercial sales and work in the news department (Tr. 55). His engineering duties involved system design, component specification, studio layout and maintenance and installation of station broadcast equipment (Multiplex Exhibit C; Tr. 55, 56).

11. Mr. Tenney is not a local resident of Buckhannon, but lives roughly 11 to 12 miles from Buckhannon in Tallmansville, West Virginia (Tr. 55). He is not a member of any group, organization or club in Buckhannon (Multiplex Exhibit C; Tr. 54).

WBUC

12. Jesse D. Newman, President, Director and 100% stockholder of WBUC will devote full-time to the construction, operation and management of the proposed FM station.

13. Mr. Newman's prior broadcast experience is extensive. He has also worked on several important radio projects for both the U.S. Army and the government and his experience in the field extends over a period of more than 40 years (WBUC Exhibit 1).

14. Mr. Newman has resided in Buckhannon for the past 23 years and is deeply involved in civic affairs. His activities in the Buckhannon community include the following: Chamber of Commerce—Board of Directors; West Virginia Strawberry Festival—Vice President; Buckhannon Pilots Association—President; Volunteer Fire Department—active member; Retail Merchants Association—active member; High School Social Sciences Fair—Judge at festival and fair pageants and Band Boosters Club—active member (WBUC Exhibit 4).

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[3] WBUC challenges this finding in its reply proposed findings and states that Buckhannon has a newspaper published three times a week and is served by other commercial radio stations and a local college station. The record does not support this WBUC proposed reply finding.

Conclusions of Law

Diversity of Media of Mass Communications

1. The diversification factor is one of primary significance in the licensing scheme. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393 (1965) (hereinafter referred to as *Policy Statement*). In this proceeding, four of the five principals of Multiplex own or work for three other West Virginia stations.

2. However, far more significant here is the fact that Mr. Newman already owns a broadcast station in the community of license.[4] Thus, a substantial preference must be accorded to Multiplex since it would create a new and competing broadcast voice in Buckhannon, whereas a grant of WBUC would not. See *Hassayampa Broadcasting,* FCC 82R-70, 52 RR 2d 1059 (Rev. Bd. 1982) and *Communications Properties, Inc.,* FCC 82R-64, 52 RR 2d 981 (Rev. Bd. 1982).

Best Practicable Service

3. Though Multiplex has been awarded a substantial preference on the issue of diversification, this preference must now be considered along with other preferences accruing to each applicant under the criteria set out by the *Policy Statement.*

Integration of Ownership and Control

4. Multiplex is entitled to 30% quantitative credit for integration of ownership and management since only Mr. Tenney, as 30% stock subscriber, will be involved in the day-to-day operation of the proposed station. In addition, Multiplex can claim slight qualitative enhancement by virtue of residence since Mr. Tenney, though not a resident of the principal community, is residing within the proposed service area.[5] None of the principals are involved in any of the community's civic organizations.

5. WBUC is entitled to 100% quantitative credit for 100% integration of ownership and management since Mr. Newman, as 100% owner, proposes to work at the station on a full-time basis. WBUC's integration proposal is qualitatively enhanced by virtue of the fact that Mr. Newman is a resident of Buckhannon and is an active participant in the community's civic affairs.

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[4] Other interests in the principal community be be served will normally be of most significance, followed by other interests in the remainder of the proposed service area . . . *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393; 5 RR 1901 (1965).

[5] Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community but within the proposed service area. *Policy Statement on Comparative Broadcast Hearings,* 1 FCC 2d 393; 5 RR 1901 (1965).

6. While prior experience is considered to be a minor factor in determining best practicable service, it does have significance.[6] While Mr. Tenney does have a credible broadcast background, the preference accorded WBUC merits even greater weight in light of the extensive prior broadcast experience of Mr. Newman.

Ultimate Conclusion

7. Based on a review of all of the comparative factors and the comparative preferences awarded to Multiplex and to WBUC, it is concluded that on a comparative basis, Multiplex's application is superior to WBUC's and that the public interest will be better served by a grant of Multiplex's application and a denial of WBUC's application.

8. It should be noted that while WBUC received a preference in the area of integration of ownership and control, this preference could not outweigh the substantial preference accorded to Multiplex under the diversification criterion.

9. Accordingly, IT IS ORDERED, that unless an appeal is taken from this Initial Decision[7] or the Commission reviews it on its own motion, the application of Multiplex (File No. BPH-810407AA) IS GRANTED and the application of WBUC (File No. BPH-810227AB) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
BYRON E. HARRISON, *Administrative Law Judge*

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[6] Previous broadcast experience, while not so significant as local residence, also has some value when put to use through integration of ownership and management. *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393; 5 RR 1901 (1965).

[7] Under Rule 1.276, appeals (in the form of exceptions to the Initial Decision) must be filed within thirty (30) days of the public release of the full text hereof, unless an extension of time is granted. In the event no exceptions are filed and the Commission has not undertaken a review of the Initial Decision during the prescribed 50-day period or taken any of the actions specified in paragraph (c) of Rule 1.276, the Initial Decision becomes effective pursuant to paragraph (c) of Rule 1.276.

Commissioner, Former, Practice Before FCC
Conflict of Interest
Employee Conduct
Misconduct
Representative Capacity
Rules, Amendment of

Parts 0, 1, and 19 of the Rules are amended in accordance with the Ethics in Government Act of 1978. Rules include post employment restrictions for former Commission employees and public financial reporting requirements for certain high-level Commission personnel.
–Parts 0, 1, & 19 Amended

FCC 83–417

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:

Amendment of Parts 0, 1, and
19 of the Rules and Regulations
in accordance with the Ethics
in Government Act of 1978

ORDER

(Adopted: September 13, 1983 Released: September 20, 1983)

BY THE COMMISSION:

1. The Commission is adopting rules which provide guidance to employees and former employees on conflict-of-interest matters. These rules comport with the Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824 (approved Oct. 26, 1978). In general, as it pertains to this agency, the law made two principal changes in "conflict of interest" requirements: (a) Annual financial reporting requirements for certain high-ranking or policy-making employees; and (b) Amendments of 18 U.S.C. §207 regarding restrictions on post-employment activities of employees. Further, the Act was amended by two subsequent Acts of Congress, each affecting one of the two referenced parts of the Ethics Act. *See* Pub. L. No. 96–19, 93 Stat. 37 (June 13, 1979) and Pub. L. No. 96–28, 93 Stat. 76 (June 22, 1979). The 97th Congress made further modifications to the Act (Pub. L. No. 97–409; approved Jan. 3, 1983).

2. The Act established the Office of Government Ethics which, in consultation with the Attorney General, subsequently issued regula-

tions to implement the Act and to provide guidance to federal agencies in exercising the administrative enforcement authority provided in the Act. On February 1, 1980, the Office of Government Ethics issued 5 C.F.R. Part 737 (45 Fed. Reg. 7406)[1] concerning post employment conflict of interest; on October 21, 1980 the Office issued 5 C.F.R. Part 734 (45 Fed. Reg. 69776) concerning financial disclosure requirements. The Act and the regulations issued by the Office of Government Ethics take precedence should they conflict with the regulations issued by the Commission on this matter. *Cf.* 5 C.F.R. §737.1.

3. To implement the Act and to provide guidance to employees and former employees, the Commission is adopting regulations concerning both (a) post-employment conflict of interest restrictions and (b) financial disclosure requirements for executive personnel.

Post Employment Conflict of Interest

4. Title V of the Act and the regulations are intended to bar certain acts by former Commission employees which may reasonably give the appearance of making unfair use of prior Commission employment and affiliations. The policy considerations involved are outlined in the following manner at 5 C.F.R. §737.1(c). When *any* former Commission employee who has been involved with a particular matter decides to act as the representative for another person on that matter, such "switching of sides" undermines confidence in the fairness of proceedings and creates the impression that personal influence, gained by Commission affiliation, is decisive. Similarly, when a former *Commissioner* or *senior* employee assists in representing another by personal presence at an appearance before the Commission regarding a matter which is in dispute, such assistance suggests an attempt to use personal influence and the possible unfair use of information unavailable to others. Former Commissioners and employees are required to avoid such activities in the circumstances specified by statute and in the regulations.

5. The provisions of 18 U.S.C. §207 do not, however, bar any former Commission employee, regardless of rank, from employment with any private or public employer after Commission service. Instead, only certain acts which are detrimental to public confidence in the Commission are prohibited. See 5 C.F.R. §737.1.

6. Federal departments and agencies have primary responsibility for the administrative enforcement of the post employment restrictions found in the Act. Consequently, the Commission is adopting regulations in Part 1 of the Rules which provide guidance to employees and which specify the procedures for administrative enforcement of the post-employment restrictions. The rules do not

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[1] *See also* 45 Fed. Reg. at 75525 (Nov. 14, 1980) and 48 Fed. Reg. at 8213 (Feb. 25, 1983).

supplant restrictions that may be contained in laws other than 18 U.S.C. §207 (*e.g.*, 18 U.S.C. §208, 47 U.S.C. §154(b)) and do not incorporate restrictions contained in the code of conduct of a profession of which an employee may be a member.

Financial Disclosure Requirements

7. Title II of the Ethics in Government Act requires high-level Federal executives to disclose their personal financial interests and thereby demonstrate that they are able to carry out their duties without compromising the public trust. Title II of the Act and the regulations serve to deter conflicts of interest and to identify potential conflicts of interest in the case of newcomers to Government service by providing for a systematic review of the financial holdings of both current and prospective officers and employees.

8. Statements of income, assets and liabilities must be reported by presidential appointees, those in the Senior Executive Service, those in confidential or policymaking positions (Schedule C), and civil service employees in grades GS-16 and above (and the equivalent). The reports are not net worth statements. Only assets held as investments and certain other items must be recorded—not items for personal use. These reports are available to the public. If anyone uses them for commercial or credit rating reasons or in connection with the solicitation of money for any political, charitable or similar purpose, the Attorney General may institute a civil action against such a person which may result in a penalty not to exceed $5,000. Personnel below the grade of GS-16 continue to remain subject to the financial reporting requirements contained in Part 19 of the Commission's Rules. These statements, however, are confidential and are not available for public inspection. See 5 C.F.R. §734.104.

9. The rules being adopted identify the individuals who are expected to file such statements, outline the process by which the reports are to be reviewed, and specify the procedures which accompany public disclosure of such reports. Individuals should also refer to 5 C.F.R. Part 734 for specific information about the contents of such reports.

10. To implement these provisions in the law, the Commission is amending Parts 0, 1, and 19 of its Rules as indicated in the Appendix to this Order. In addition, certain other portions of Part 19 are being updated and revised to comport with these provisions. Authority for these amendments is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§154(i) & 303(r), and in 18 U.S.C. §207(j). Because the amendments concern matters of internal agency procedure or practice, the prior notice provisions of 5 U.S.C. §553 are inapplicable.

11. Accordingly, IT IS ORDERED, effective October 27, 1983,

that Parts 0, 1, and 19 of the Rules are amended as set out in the attached Appendix.[2]

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

APPENDIX

1. In 47 C.F.R. Section 0.231, subsection (i) is added to read as follows:

§0.231 *Authority delegated.*

* * * * *

(i) The Chief, Internal Review and Security Division, Office of Managing Director, is delegated authority to act as the "designated agency ethics official" within the meaning of §§206 and 209(10) of the Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824 (1978). Cross-reference 47 C.F.R. Part 19, Subpart E.

2. In 47 C.F.R. Section 0.455(f), paragraph (4) is added to read as follows:

§0.455 *Other locations at which records may be inspected.*

* * * * *

(f) ***

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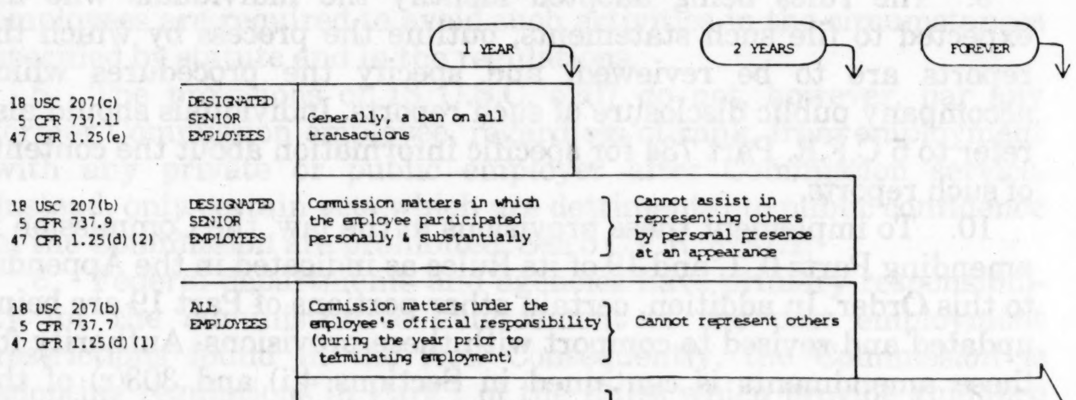
[2] The post employment provisions are depicted in the diagram below. This chart is presented merely to simplify explanation; it does not include all exceptions. The restrictions are governed only by the rules and not by information in this diagram.


POST EMPLOYMENT RESTRICTIONS
1 YEAR
2 YEARS
FOREVER
18 USC 207(c)
5 CFR 737.11
47 CFR 1.25(e)
DESIGNATED SENIOR EMPLOYEES
Generally, a ban on all transactions
18 USC 207(b)
5 CFR 737.9
47 CFR 1.25(d)(2)
DESIGNATED SENIOR EMPLOYEES
Commission matters in which the employee participated personally & substantially
Cannot assist in representing others by personal presence at an appearance
18 USC 207(b)
5 CFR 737.7
47 CFR 1.25(d)(1)
ALL EMPLOYEES
Commission matters under the employee's official responsibility (during the year prior to terminating employment)
Cannot represent others
18 USC 207(a)
5 CFR 737.5
47 CFR 1.25(c)
ALL EMPLOYEES
Commission matters in which the employee participated personally & substantially
Cannot represent others

(4) Reports filed pursuant to Subpart E of Part 19 of this chapter and applications for inspection of such reports. See Section 0.460(k).

3. In 47 C.F.R. Section 0.460, subsection (a) is amended by adding, before the comma in the second sentence, the following: "and subsection (k) of this section"

4. In 47 C.F.R. Section 0.460, subsection (h) is amended by adding, at the end of the first sentence, the following: ", subject to subsection (k) of this section."

5. In 47 C.F.R. Section 0.460, subsection (k) is added to read as follows:

§0.460 *Requests for inspection of records which are routinely available for public inspection.*

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(k) In addition to the other requirements of this section, the following provisions apply to the reports filed with the Commission pursuant to Subpart E of Part 19 of this chapter.

(1) Such reports shall not be obtained or used: (i) for any unlawful purpose; (ii) for any commercial purpose, other than by news and communications media for dissemination to the general public; (iii) for determining or establishing the credit rating of any individual; or (iv) for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(2) Such reports may not be made available to any person nor may any copy thereof be provided to any person except upon a written application by such person stating: (i) that person's name, occupation and address; (ii) the name and address of any other person or organization on whose behalf the inspection or copying is requested; and (iii) that such person is aware of the prohibitions on the obtaining or use of the report. Further, any such application for inspection shall be made available to the public throughout the period during which the report itself is made available to the public.

6. In 47 C.F.R. Part 1, Section 1.25 is revised to read as follows:

§1.25 *Former Commissioners and employees.*

(a) [reserved]

* * * *

(c) *Restrictions on any former Commission employee's acting as representative as to a particular matter in which the employee personally and substantially participated.*

No former Commissioner or Commission employee (including special Government employee) shall knowingly act as agent or attorney for, or otherwise represent, any other person (other than the United States) in any formal or informal appearance before, or, with the intent to influence, make any oral or written communication to the Commission on behalf of any other person in connection with any particular Commission matter involving a specific party in which the Commissioner or employee participated personally and substantially while so employed. See 18 U.S.C. §207(a) and 5 C.F.R. §737.5.

(d) (1) *Two-year restriction on any former Commission employee's acting as representative as to a particular matter for which the employee had official responsibility.*

No former Commissioner or Commission employee (including special Government employee), within two years after the cessation of such employment, shall knowingly act as agent or attorney for, or otherwise represent, any other person (other than the United States) in any formal or informal appearance before, or,

with the intent to influence, make any oral or written communication on behalf of any other person (other than the United States) to the Commission in connection with any particular Commission matter involving a specific party which was actually pending at the Commission and was under his or her official responsibility within one year prior to the termination of such responsibility. See 18 U.S.C. §207(b) and 5 C.F.R. §737.7.

(2) *Two-year restriction on a former senior employee's assisting in representation as to a matter in which the employee participated personally and substantially.*

No former Commissioner or senior employee (as defined in subsection (h)) of the Commission (including special Government employee), within two years after the cessation of such employment, shall knowingly represent or aid, counsel, advise, consult, or assist in representing any other person (other than the United States) by personal presence at any formal or informal appearance before the Commission in connection with any particular Commission matter involving a specific party in which he or she participated personally and substantially as an employee. See 18 U.S.C. §207(b) and 5 C.F.R. §§737.9 & 737.33

(e) *One-year restriction on a former senior employee's transactions with former agency on a particular matter, regardless of prior involvement.*

(1) No former Commissioner or senior employee (as defined in subsection (h)) of the Commission (other than a special Government employee who serves for fewer than 60 days in a calendar year), within one year after such employment has ceased, shall knowingly act as agent or attorney for, or otherwise represent, any person (other than the United States) in any formal or informal appearance before, or, with the intent to influence, make any oral or written communication to the Commission on behalf of anyone (including himself or herself) other than the United States in connection with any particular Commission matter (whether or not involving a specific party) which is pending before the Commission or in which the Commission has a direct and substantial interest. See 18 U.S.C. §207(c) and 5 C.F.R. §§737.11 & 737.33.

(2) The prohibition of this subsection shall not apply to appearances, communications, or representation by a former Commissioner or employee, who is an elected official of a State or local government, or whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under Section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization. See 18 U.S.C. §207(d)(2) and 5 C.F.R. §737.11(b).

(3) The prohibition contained in this subsection shall not apply to appearances or communications by a former Commissioner or employee concerning matters of a personal and individual nature; nor shall the prohibition of this subsection prevent a former Commissioner or employee from making or providing a statement which is based on the former Commissioner's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses. See 18 U.S.C. §207(i) and 5 C.F.R. §737.11(h) & (i).

(f) The prohibitions of subsections (c), (d), and (e) of this section shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the Commission. See 18 U.S.C. §207(f) and 5 C.F.R. §737.15.

(g) The prohibitions of subsections (c), (d), and (e) of this section shall not apply if the Commission, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the Federal Register, that the former Commissioner or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former Commissioner or employee. See 18 U.S.C. §207(f) and 5 C.F.R. §737.17.

(h) (1) The phrase "senior employee," when used in this section, means an officer or employee in a position established within the Senior Executive Service (pursuant to the Civil Service Reform Act of 1978) or a position for which the basic rate of pay is equal to or greater than the basic pay rate of GS-17 of the General Schedule prescribed by 5 U.S.C. §5332, and who has significant decisionmaking or supervisory responsibility. Such officers and employees are so designated by the Office of Government Ethics in consultation with the head of the agency. See 5 C.F.R. §§737.25 & 737.33.

(2) The phrase "particular Commission matter involving a specific party," when used in subsections (c) and (d) of this section, means any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the Commission is a party or has a direct and substantial interest.

***Note*: Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter. Therefore, a former Commission employee may represent another person in connection with a particular matter involving a specific party even if rules or policies which he or she had a role in establishing are involved in the proceeding.**

(3) The phrase "participated personally and substantially" as used in this section is defined in 5 C.F.R. §737.5(d).

(4) The phrase "official responsibility" as used in this section is defined in 5 C.F.R. §737.7(b).

(i) Nothing in this section shall prevent a former Commissioner or employee from giving testimony under oath or from making statements required to be made under penalty of perjury. See 18 U.S.C. §207(h) and 5 C.F.R. §737.19.

(j) Measurement of the restriction periods contained in this section is outlined in 5 C.F.R. §§737.7(e), 737.9(e), and 737.11(j).

(k) If the Commission finds, after notice and opportunity for a hearing, that such former Commissioner or employee violated the prohibitions of this section, the Commission may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearances before, or, with the intent to influence, any oral or written communication to, the Commission on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. See 18 U.S.C. §207(j).

7. In 47 C.F.R. Part 1, Section 1.28 is added to read as follows:

§1.28 *Administrative Enforcement of Improper Post-Employment Activity*

(a) *General.* A violation of Section 1.25 of this Part may be cause for appropriate administrative action which may be in addition to any penalty prescribed by law.

This section is established to enforce the provisions of Section 1.25 of this Part and to implement the provisions of 5 C.F.R. §737.27.

(b) *Initiation of Enforcement Action.* (1) Information regarding a possible violation of Section 1.25 of this Part or of 18 U.S.C. §207 by a former Commissioner or former Commission employee may be brought to the attention of the Commission by filing such information with the Designated Agency Ethics Official (see 47 C.F.R. §0.231(i)).

(2) On receipt of information regarding a possible violation of Section 1.25 of this Part or 18 U.S.C. §207, and after determining that such information appears substantiated, the General Counsel shall expeditiously provide such information, along with any comments or Commission regulations, to the Director of the Office of Government Ethics and to the Criminal Division, Department of Justice. The Commission shall coordinate any investigation on administrative action with the Department of Justice to avoid prejudicing criminal proceedings, unless the Department of Justice communicates to the Commission that it does not intend to initiate criminal prosecution.

(3) Whenever the Commission has determined after appropriate review that there is reasonable cause to believe that a former Commissioner or Commission employee has violated Section 1.25 of this Part or 18 U.S.C. §207, it may designate the matter for an administrative disciplinary proceeding.

(c) *Hearing*. (1) Upon designating such matter for an administrative disciplinary proceeding, the Commission shall provide the former Commissioner or former Commission employee with notice of an intention to institute a proceeding and an opportunity for a hearing. Such notice shall include: (i) A statement of allegations (and the basis thereof) sufficiently detailed to enable the former Commission employee to prepare an adequate defense; (ii) notification of the right to a hearing; and (iii) an explanation of the method by which a hearing may be requested.

(2) If such former Commissioner or Commission employee has failed to request a hearing within the time specified after receiving adequate notice or has waived the opportunity for a hearing, the Commission may take such administrative action as outlined in subsection (d) of this section.

(3) (i) The presiding official at proceedings under this section shall be the Chairman or an individual designated by the Chairman or by the Commission. (ii) The presiding official at such proceeding must be a Commissioner, a member of the Review Board, an Administrative Law Judge, an attorney employed by the Commission, or a person qualified to practice law as provided in Section 1.23 of this Part. The presiding official shall be provided with appropriate administrative and secretarial support by the Managing Director. (iii) The presiding official shall be impartial. No individual who has participated in any manner in the decision to initiate the proceeding may serve as the presiding official in those proceedings.

(4) The hearing shall be conducted at a reasonable time, date, and place. In setting a hearing date, the presiding official shall give due regard to the former government employee's need for: (i) Adequate time to prepare a defense properly; and (ii) an expeditious resolution of allegations that may be damaging to his or her reputation.

(5) The hearing shall include, at a minimum, the following rights for all parties: (i) To represent oneself or to be represented by counsel; (ii) to introduce and examine witnesses and to submit physical evidence; (iii) to confront and cross-examine adverse witnesses; (iv) to present oral argument; and (v) to a transcript or recording of the proceedings, on request.

(6) In any hearing under this section, the Commission has the burden of proof and must establish substantial evidence of a violation.

(7) (i) The presiding official shall make a determination exclusively on matters of record in the proceeding, and shall set forth in an initial decision all findings of fact and conclusions of law relevant to the matters at issue. (ii) Within 30 days after the initial decision, any party to the proceeding may appeal the decision to the Commission. Unless the Commission orders otherwise, other parties to the proceeding may file comments within 20 days after such appeal is filed, and the party which filed such appeal may file a reply within 10 days after the period for filing comments has expired. The Commission shall base its decision on such appeal solely on the record of the proceedings or those portions thereof cited by the parties to limit the issues. (iii) If the Commission modifies or reverses the initial decision, it shall specify such findings of fact and conclusions of law as are different from those of the presiding official.

(d) *Administrative Sanctions*. The Commission may take appropriate action in the case of any individual who failed to request a hearing after receiving adequate notice or who was found in violation of Section 1.25 of this Part, of 5 C.F.R. Part 737, or of 18 U.S.C. §207 after a final administrative decision, by: (i) Prohibiting the individual from making, on behalf of any other person (except the United States), any formal or informal appearance before, or with the intent to influence, any oral or written communication to, the Commission on any matter of business for a period not to exceed five years, which may be accomplished by directing Commission employees to refuse to participate in any such appearance or to accept any such communication, (ii) Taking other appropriate disciplinary action.

(e) *Judicial Review*. Any person found to have participated in a violation of Section 1.25 of this Part, of 5 C.F.R. Part 737, or of 18 U.S.C. §207 may seek judicial review of the administrative determination.

8. In 47 C.F.R. Part 1, Section 1.29 is added to read as follows:

§1.29 *Current partners of current employees*.

No current partner of a current Commissioner or current Commission employee (including a special Government employee) shall act as agent or attorney for anyone (other than the United States) before the Commission in connection with any particular Commission matter in which such Commissioner or employee participates or has participated personally and substantially as a Commissioner or employee, or which is the subject of his or her official responsibility. See 18 U.S.C. §207(g) and 5 C.F.R. §737.21.

9. In 47 C.F.R. Part 19, Section 19.735–101 is amended by deleting the last two sentences and adding the following: "In accordance with these concepts, this Part sets forth the Commission's regulations prescribing standards of conduct and responsibilities and governing statements of employment and financial interests for employees and special Government employees. The Commission has delegated to the Chairman responsibility for the detection and prevention of acts, short of criminal violations, which could bring discredit upon the Commission and the Federal service."

10. In 47 C.F.R. Part 19, Section 19.735–104 is revised to read as follows:

§19.735–104 *Issuance and Availability of Commission Regulations*.

(a) The regulations in this part have been prepared in accordance with 5 C.F.R. Parts 734, 735, and 737 in order to:

(1) Implement the requirements of the Executive Order and Parts 734, 735, and 737 of Title 5 C.F.R.

(2) Prescribe additional standards of ethical and other conduct and reporting

requirements that are appropriate to the particular functions and activities of the Commission and are not inconsistent with the Executive Order and Parts 734, 735, and 737 of Title 5 C.F.R.

(b) The Commission shall furnish each new employee and special Government employee with a copy of the Commission's regulations in this part, as revised, at the time of his or her entrance on duty. The Head of each Office and Bureau has the responsibility to secure from every person subject to his or her administrative supervision a statement indicating that the individual has read and is familiar with the contents of the revised order and regulations in this part, and to advise the Managing Director that all persons have stated they are familiar with the revised order and regulations in this part. Each new employee shall execute a similar statement at the time of entrance on duty. Periodically, and at least once a year, the Managing Director shall take appropriate action to insure that the Head of each Office and Bureau shall remind employees subject to his or her administrative supervision of the content of the regulations in this part.

(c) Copies of laws, the Executive Order, and this agency's regulations and instructions relating to ethical and other conduct shall be available in the office of the Designated Agency Ethics Official for review by employees and special Government employees. (See 47 C.F.R. §0.231(i).)

11. In 47 C.F.R. Section 19.735–105, subsections (a) and (e) are revised to read as follows:

§19.725–105 *Interpretation and advisory service.*

(a) (1) The Chief, Internal Review and Security Division, is designated as the agency's ethics official for purposes of 5 C.F.R. Parts 734 and 737. The General Counsel is designated as legal counselor for the Commission to provide guidance on matters relating to ethical conduct. The General Counsel is to serve as the Commission's designee to the Office of Personnel Management on matters covered by 5 C.F.R. Part 735.

(2) The Office of the General Counsel is responsible for coordination of the Commission's legal counseling services provided under paragraph (b) of this section and for assuring that legal counseling and interpretation on questions of conflict of interest and other matters covered by this part are available.

* * * * *

(e) At the time of an employee's entrance on duty and at least once each calendar year thereafter, the Commission's employees and special Government employees shall be notified of the availability of counseling services and of how and where these services are available.

12. In 47 C.F.R., Part 19 is amended by removing Section 19.735–106.

13. In 47 C.F.R. Section 19.735–107, subsection (c) is amended by removing the phrase "§19.735–106(b)" and inserting in its place the phrase "§19.735–405(e)".

14. In 47 C.F.R. Section 19.735–204, subsection (f) is added read as follows:

(f) Procedures for requesting a waiver of the applicability of the above conflict of interest statutes appear at Section 19.735–412 of this part.

15. In 47 C.F.R. Section 19.735–210, subsections (r) and (s) are added to read as follows:

§19.735–210 *Miscellaneous statutory provisions.*

* * * * *

(r) The Ethics in Government Act of 1978 (92 Stat. 1824 (1978)), as amended (see 93 Stat. 37 & 76 (1979)).

(s) The prohibitions applicable to former Commissioners and employees and their partners. (18 U.S.C. §207) Cross-reference §§1.25 and 1.29 of this chapter.

16. In 47 C.F.R. Section 19.735–306, subsection (d) is revised and subsection (e) is removed to read as follows:

§19.735–306 *Miscellaneous statutory provisions.*

* * * * *

(d) Section 207 of Title 18 of the United States Code provides prohibitions relating to special Government employees and their partners respecting appearances before agencies of the United States. See §§1.25 & 1.29 of this chapter.

[(e) deleted]

17. In 47 C.F.R. Part 19, Section 19.735–403 is revised to read as follows:

§19.735–403 *Employees required to submit statements.*

(a) A "Confidential Statement of Employment and Financial Interests" (FCC Form A-54) shall be required from the following employees of the Commission:

(1) Employees who are in Grades GS-13 through GS-15.

(2) Those employees who are in Grades GS-11 through GS-12 who are Heads or Supervisors or Assistant Heads or Supervisors of field offices.

(3) All purchasing agents.

(4) All employees serving as auditors or accountants, with the principal duty of auditing private enterprises.

(5) All employees in the offices of the Commissioners not subject to the reporting requirements of Subpart E of this Part.

(6) Employees in positions classified below GS-13 may be required to file if the positions they hold meet the criteria established in 5 C.F.R. §735.403 and the requirement to file has been specifically justified by the Commission to the Office of Personnel Management.

(b) A "Confidential Statement of Employment and Financial Interests" shall be required from Commissioners and employees who are subject to separate reporting requirements under Subpart E of this Part or Section 401 of Executive Order 11222, but such statement shall be filed on FCC Form A-54A.

18. In 47 C.F.R. Part 19, Section 19.735–404 is removed.

19. In 47 C.F.R. Part 19, Section 19.735–405 is revised to read as follows:

§19.735–405 *Submission and review of employees' statements.*

(a) An employee required to submit a statement of employment and financial interests pursuant to §19.735–403 shall submit that statement on the prescribed form not later than thirty days after his or her entrance on duty.

(b) An employee required to submit a statement of employment and financial interests shall submit that statement to the office of the Managing Director.

(c) An employee required to submit a statement of employment and financial interests will be individually notified of his or her obligation to file.

(d) Financial statements submitted under Subpart D shall be reviewed by the Designated Agency Ethics Official.

(e) When a statement submitted under Subpart D of this part or information from other sources indicates a conflict between the interests of an employee or special Government employee and the performance of his or her services for the Government, the information concerning the conflict or appearance of conflict shall be reported to the Managing Director and the employee or special Government employee concerned shall be provided an opportunity to explain the conflict or appearance of conflict.

(f) When, after explanation by the employee or special Government employee involved, the conflict or appearance of conflict is not resolved, the information concerning the conflict or appearance of conflict shall be reported to the Chairman through the Designated Agency Ethics Official (see 47 C.F.R. §0.231(i)) for appropriate administrative action.

20. In 47 C.F.R. Part 19, Subpart E is added to read as follows:

Subpart E—Financial Reporting Requirements of the Ethics in Government Act

§19.740 *General.*

Commissioners and certain senior and policymaking employees, as specified in this Subpart, must file a Financial Disclosure Report annually or as otherwise required by this Subpart. The provisions of this Subpart are issued in accordance with the reporting requirements of the "Ethics in Government Act of 1978," Pub. L. No. 95–521, 92 Stat. 1824 (Oct. 26, 1978), as amended by Pub. L. No. 96–19, 93 Stat. 37 (June 13, 1979). See 5 C.F.R. Part 734.

§19.741 *Persons Required to file.*

(a) *Incumbents.* Individuals who have served in the following positions for more than 60 days during any calendar year must file an "Executive Personnel Financial Disclosure Report" (OPM Standard Form 278) on or before May 15 of the succeeding year with the Designated Agency Ethics Official:

(1) Commissioners;

(2) Members of the Review Board;

(3) Administrative Law Judges;

(4) All employees (including special Government employees as defined in 18 U.S.C. §202) whose rate of pay (excluding "step" increases) equals or exceeds the base pay of grade GS-16 of the General Schedule; and

(5) All employees in positions excepted from the competitive service by reason of being of a confidential or policymaking character, such positions to include (but are not necessarily limited to) legal, engineering, confidential and special assistants to the Commissioners and other employees in the excepted service whose positions are policymaking or confidential in character, provided that a person in such position whose rate of basic pay is less than the base pay of grade GS-16 and who has no role in advising or making policy determinations may be excluded from the requirements of this section upon compliance with the requirements of 5 C.F.R. §734.203.

(6) Designated Agency Ethics Official

(b) The following individuals must file with the Designated Agency Ethics Official an "Executive Personnel Financial Disclosure Report" (OPM Standard Form 278) within the time specified for each:

(1) *Nominees.* Any person nominated to be a member of the Commission must file such report within five days of the transmittal by the President to the Senate of the nomination of the individual.

(2) *New Entrants.* Persons who have assumed a position described in paragraph (a) of this section must file such report within 30 days of assuming such position, unless the individual has left another Government position described in 5 C.F.R. §734.202 within 30 days of assuming such new position or has filed such report pursuant to category (1) of this paragraph. This requirement shall not apply to an individual who, as determined by the Designated Agency Ethics Official, is not reasonably expected to perform the duties of his office or position for more than 60 days in a calendar year, except that if such individual performs the duties of his or her office or position for more than 60 days in a calendar year such report shall be filed within 15 days of the sixtieth day.

(c) *Termination of Employment.* Persons who have terminated employment in a position described in paragraph (a) of this section must file an "Executive Personnel Financial Disclosure Report" (OPM Standard Form 278) with the Designated Agency Ethics Official within 30 days of termination of employment, unless such individual has accepted employment in another Government position described in 5 C.F.R. §734.202. Such report shall cover:

(1) The preceeding calendar year (if the report required by paragraph (a) of this subsection has not been filed); and

(2) the portion of the calendar year in which such termination occurs up to the date the individual left such position. This paragraph does not apply to an individual who does not perform the duties of his office or position for more than 60 days in a calendar year.

(d) *Waiver.* The Director of the Office of Government Ethics may grant a publicly available request for a waiver of any reporting requirement under this subsection for an individual who is expected to perform or has performed the duties of his or her office or position fewer than 130 days in a calendar year, but only if the Director determines that: such individual is not a full-time employee of the Government; such individual is able to provide services specially needed by the Government; it is unlikely that the individual's outside employment or financial interests will create a conflict of interest; and public financial disclosure of such individual is not necessary in the circumstances. See 5 C.F.R. §734.205.

(e) *Extensions.* The Designated Agency Ethics Official may, for good cause, grant an extension of time for filing the reports required by this section of up to 45 days. Any other extension must have the approval of the Office of Government Ethics. See 5 C.F.R. §734.201(f).

(f) After being reviewed in accordance with Section 19.742 of this Subpart, copies of the reports filed under subsections (a)(1), (a)(6), and (b)(1) of this section shall be transmitted to the Director of the Office of Government Ethics.

§19.742 *Review of Reports*

Each report filed under this Subpart shall be reviewed by the Designated Agency Ethics Official (DAEO) within 60 days after such filing. The report filed by the DAEO shall be reviewed by the Chairman (or his or her delegate) prior to transmitting a copy to the Director of the Office of Government Ethics.

(a) If the report is in compliance with applicable laws and regulations, the report shall be so certified by the DAEO.

(b) If additional information is required, the DAEO shall notify the individual of the additional information required and the date by which it must be submitted.

(c) If the DAEO finds reason to believe, based on the information submitted, that the individual may not be in compliance with applicable laws and regulations, the DAEO shall notify the individual and afford him or her a reasonable opportunity for a written or oral response. If, after considering any such response, the DAEO concludes than an individual is not in compliance with applicable laws and regulations, the DAEO shall notify the individual of that opinion and, after an opportunity for personal consultations (if practicable), determine and notify the individual of which steps, if any, would in the DAEO's opinion be appropriate for assuring compliance with such laws and regulations and the date by which such steps should be taken, ordinarily within 90 days. If steps for assuring compliance are not taken by the specified date, the matter shall be referred to the Commission for appropriate action (or, in the case of a Commissioner, to the President). See 5 C.F.R. §734.604.

(d) For purposes of assisting employees, the DAEO shall maintain a list, which shall be available to employees, of those circumstances or situations which have resulted or may result in noncompliance with applicable laws and regulations. The absence of a particular circumstance from such list shall not be construed that such circumstance would be in compliance.

§19.743 *Custody of and Public Access to Reports*

(a) A copy of a position description shall, if available, be attached by the Designated Agency Ethics Official to each report filed pursuant to this Subpart.

(b) Any report filed pursuant to this Subpart shall be available for public inspection and copying within 15 days after such report is received upon fulfillment of the requirements of Section 0.460 of Part 0 of this chapter. Such reports shall not be obtained or used: for any unlawful purpose; for any commercial purpose, other than by news and communications media for dissemination to the general public; for determining or establishing the credit rating of any individual; or for use, directly or indirectly, in the solicitation of money for any political, charitable, or other purpose.

(c) Any report filed pursuant to this Subpart shall be retained by the agency and made available to the public for six years after receipt of the report. After such six-year period the report shall be destroyed unless needed in an ongoing investigation or as otherwise provided by Section 205(d) of the Ethics in Government Act of 1978. See also 5 C.F.R. §734.603(f).

Application, Amendment of
Reconsideration, Petition for, Denial of

Petition for reconsideration of Bureau's action dismissing amended application denied. Commission found both the staff's assessment and conclusions correct.
–Rancocas Valley B/cing

FCC 83–404

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Application of RANCOCAS VALLEY BROADCASTING COMPANY, INC. Mt. Holly, New Jersey Req. 1460 kHz, 5 kw, DA- D For Construction Permit	File No. BP-821203AA

MEMORANDUM OPINION AND ORDER

(Adopted: September 9, 1983 Released: September 26, 1983)

BY THE COMMISSION:

1. By Memorandum Opinion and Order, *Whale Communications, Inc.*, MM-3767, released April 27, 1983, the Chief of the Mass Media Bureau, acting pursuant to delegated authority, dismissed the application of Rancocas Valley Broadcasting Company, Inc., for the deleted facilities of station WJJZ, Mt. Holly, New Jersey. Rancocas Valley here seeks reconsideration of that action,[1] a request which we consider on the merits pursuant to Section 1.106(a)(1) of our Rules, the status of the instant proceeding making our immediate attention to this matter advisable.[2] Real Life Broadcasting, Inc., whose application for the deleted facilities - along with the mutually exclusive proposal of Whale Communications Inc. - was designated

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[1] Our recent revision of Section 1.115 (FCC 83–90, released March 14, 1983) eliminates direct review of hearing designation orders issued under delegated authority absent certification of the presiding Administrative Law Judge. Having been dismissed prior to designation, the Rancocas Valley application is not formally before the Administrative Law Judge presiding here.

[2] The Memorandum Opinion and Order dismissing Rancocas Valley's application designated for hearing two other proposals for the deleted facilities of station WJJZ.

for hearing in the same document, opposes Rancocas Valley's request.

2. Section 73.3513(b) of our Rules provides in pertinent part that applications may be signed by an applicant's attorney rather than by the applicant itself only in cases of physical disability or absence from the United States. Signed by an attorney for its president, pursuant to a power of attorney, under neither of these circumstances,[3] the Rancocas Valley proposal was clearly defective under this provision. At issue here is whether this defect could properly be cured by subsequent amendment, a question which the Bureau properly answered in the negative, we believe.

3. It is true, as Rancocas Valley claims, that we have at times permitted amendments correcting faulty signatures. However, the factors governing our decision in those cases - namely an application substantially complete when filed and surrounding circumstances creating equities favoring acceptance - are conspicuously absent here. Compare *Jane A. Roberts*, 29 FCC 141 (1960); *Communications Gaithersburg, Inc.*, 60 FCC 2d 537 (1976); *Payvision Communications*, 47 Fed. Reg. 56907 (Mass Media Bureau 1982). With respect first to the contents of Rancocas Valley's proposal, the application as submitted did not contain two entire pages of the form. As a result it addressed only four of ten questions concerning the parties to the proposal, omitting entirely all information about their other broadcast interests and about the ownership and control of the applicant itself. Furthermore, the application did not include a certification as to the applicant's financial qualifications. A significant portion of the application form, the missing data is essential to a threshold showing of qualification *vis-a-vis* the public interest standard. See *Henry M. Lesher*, 67 FCC 2d 278 (1977). Certainly the quantity and significance of these omissions, coupled with the improper certification, distinguish Rancocas Valley's situation from the many cases it cites involving proposals substantially complete when filed and amendments correcting errors of a purely minor nature.[4]

4. As for the equities of the situation, Rancocas Valley justifies its use of a power of attorney as representing the good faith legal judgment of its president, an attorney, concerning the scope of such arrangements. It does not, however, document any effort on his part

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[3] In an affidavit accompanying its pleading, Rancocas Valley's president indicates that he was out of the state, but not the country, when the application was filed.

[4] The initial acceptance for filing of Rancocas Valley's proposal did not, as the applicant claims, raise a presumption of accordance with Commission Rules. As Section 73.3564(b) makes clear, acceptance for filing means only that an application has been the subject of a preliminary review as to completeness and does not preclude subsequent dismissal upon closer examination.

to confirm this judgment through reference to Commission rules or consultation with communications counsel.[5] Nor does it offer any reason other than inadvertence for the lack of a complete proposal, its suggestion that the missing pages were lost by Commission staff being wholly inconsistent with the fact that all copies submitted to us were incomplete. Of equal importance in this regard, Rancocas Valley has provided no explanation for its subsequent failure to provide the missing information in a timely fashion.[6] In his affidavit accompanying Rancocas Valley's pleading, the applicant's president states simply that he "recollects" the omitted data to have been included in the final draft he reviewed and does not know how or why the data did not appear in the final proposal. So indifferent an approach to our application process raises no equities on the applicant's behalf.

5. Finding itself with an application patently not in accordance with our rules and regulations and with no basis for waiver of our rules to permit its acceptance subject to amendment, the Bureau rejected Rancocas Valley's proposed ameliorative amendment and dismissed the proposal pursuant to Section 73.3566 of our Rules. We are satisfied that both its assessment of the relevant considerations and its conclusions as to their consequences were correct.

6. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Rancocas Valley Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[5] In this reliance upon unconfirmed assumption, the instant case differs from that of *Jane A. Roberts, supra*, where the applicant received specific, if erroneous, legal advice.

[6] The defects in Rancocas Valley's proposal were initially brought to light in a petition to deny filed by Whale Communications, Inc., on December 14, 1982. Rancocas Valley did not supply the missing information with its opposition pleading, but instead waited until May 18, 1983, to retender its application in connection with this pleading.

Diversification, See Also Ownership
Lottery, Licensing By
Ownership, Diversification Of, See Also Divestiture
Preference

Commission solicits comments on proposals to provide preferences for women applicants when first-time licensees in mass media services are selected by lottery.
-Random Selection/Lottery Systems
Gen. Docket No. 81-768

FCC 83-431

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings	Gen. Docket No. 81-768

THIRD NOTICE OF PROPOSED RULE MAKING

(Adopted: September 22, 1983; Released: October 18, 1983)

BY THE COMMISSION: CHAIRMAN FOWLER CONCURRING AND COMMISSIONER RIVERA CONCURRING AND ISSUING STATEMENTS.

I. *Introduction and Background*

1. The Commission here recommences consideration of the inclusion of women as a group entitled to the benefit of preferences when initial licensing proceedings in the mass media services are conducted by lottery. A brief review of the record which has thus far been developed regarding this issue is pertinent to the further deliberations being initiated with this *Notice*.

2. The Commission's original grant of statutory authority to conduct licensing proceedings by lottery was contained in Pub. L. No. 97-35, the Omnibus Budget Reconciliation Act of 1981. In providing for the use of lottery procedures, Congress also directed, in adding a new Section 309(i)(3)(A) to the Communications Act, that:

> The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection under this subsection, groups

> or organizations, or members of groups or organizations, which are underrepresented in the ownership of telecommunications facilities or properties will be granted significant preferences.

3. The *Conference Report* accompanying the new lottery legislation described the purpose of the preference provision as follows:

> It is the firm intention of the conferees that ownership by minorities, such as Blacks and Hispanics, *as well as by women*, and ownership by other underrepresented groups, such as labor unions and community organizations is to be encouraged through the award of significant preferences in any such random selection proceedings. These are groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees in establishing a random selection process that the objective of increasing the number of media outlets owned by such persons or groups be met.[1] (Emphasis added).

4. Given this expression of Congressional intent, the Commission proposed in the first *Notice* in this proceeding[2] that women be included in the list of groups to be awarded a preference in relevant lottery proceedings. We observed that as the apparent root of the preference provision was the "underrepresented" nature of the enumerated groups in telecommunications ownership, "[s]uch a preference scheme would appear to be consistent with the view that diversifying ownership of mass media is important in promoting competition in the economic and ideologic marketplaces." However, we noted that gender-based classifications must "serve governmental objectives and must be substantially related to the achievement of those objectives,"[3] adding that "[r]eduction of any disparity between men and women in telecommunications ownership as a result of discrimination against women may well be recognized as such an important governmental objective." We concluded, however, that "were the classification not enacted as compensation for past discrimination, it would be invalid."

5. In the first *Report and Order* in this proceeding, we noted that virtually all aspects of establishment and operation of the proposed preference scheme were the subject of substantial dispute among the commenters.[4] Given the complexities of implementing the lottery system within the constraints of the statute, we declined to utilize our lottery authority at that time.

6. In response to the difficulties encountered by the Commission in implementing the initial lottery statute, Congress adopted Section 115 of the Communications Amendments Act of 1982, Pub. L. No.

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[1] H.R. Rep. No. 97–208, 97th Cong., 1st Sess. (1981), at 897.

[2] *Amendment of Part 1 of the Commission's Rules to Allow the Selection From Among Mutually Exclusive Competing Applications Using Random Selection or Lotteries Instead of Comparative Proceedings*, 88 F.C.C. 2d 476, 484–485, 489–494 (1981) (hereinafter "first *Notice*").

[3] Citing *Orr v. Orr*, 440 U.S. 268, 279 (1979); *Califano v. Webster*, 430 U.S. 313, 316-317 (1977); *Craig v. Boren*, 429 U.S. 190, 197 (1976).

[4] 89 F.C.C.2d 257, 271–282 (1982) (hereinafter "first *Report and Order*").

97-259. This enactment includes provisions amending Section 309(i)(3)(A) of the Communications Act to require that:

> The Commission shall establish rules and procedures to ensure that, in the administration of any system of random selection . . . used for granting licenses or construction permits for any media of mass communications, significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase the diversification of ownership of the media of mass communications. To further diversify the ownership of the media of mass communications, an additional significant preference shall be granted to any applicant controlled by a member or members of a minority group.

The new statutory language goes on to state in Section 309(i)(3)(C)(ii) that:

> The term "minority group" includes Blacks, Hispanics, American Indians, Alaska Natives, Asians, and Pacific Islanders.

7. The *Conference Report* on the new amendments[5] describes the preferences established by statute as the "media ownership preference" and the "minority ownership preference." The conferees state that "[t]he underlying policy objective of these preferences is to promote diversification of media ownership and consequent diversification of programming content." The "media ownership preference" is a diversification preference awarded to those who own no or few other media of mass communications. The "minority ownership preference" is described as designed to promote "ownership by racial and ethnic minorities—groups that traditionally have been extremely underrepresented in the ownership of telecommunications facilities and media properties." The conferees remark that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications, as it has adversely affected their participation in other sectors of the economy as well." The "minority ownership preference" is viewed as a method of "remedying the past economic disadvantage to minorities" while "promoting the primary communications policy objective of achieving a greater diversification of the media of mass communications."

8. The conferees note, however, that:

> [S]uch groups as women, labor unions, and community organizations which are mentioned in the legislative history of the lottery statute that was originally adopted . . . are all significantly underrepresented in the ownership of telecommunications facilities. Such applicant groups would, of course, be eligible for both media ownership and minority preferences if they meet the eligibility guidelines . . . The operative definition of minority group is found in section 309(i)(3)(C)(ii), as amended by this bill. It is the Conferees intention that the definitions in Office of Management and Budget Statistical Policy Directive No. 15, "Race and Ethnic Standards for Federal Statistics and Administrative

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[5] H.R. Rep. No. 97-765, 97th Cong., 2d Sess. (1982) (hereinafter "*Conference Report II*"), at 40-45.

Reporting," be utilized for guidance with regard to any dispute as to individual's membership in a named group.

9. To implement our amended lottery authority, the Commission issued a *Second Notice of Proposed Rule Making* in this docket.[6] The *Second Notice* proposed use of minority and diversity ("media ownership") preferences in lotteries in the mass media services. It was silent on the matter of preferences for women. "Minority group" was defined only in the proposed rules, where the term was stated to "mean" those named groups the statutory definition describes as being "included" as minorities.[7] No comment appears to have been received in response to the *Second Notice* regarding the absence of women from the groups specifically scheduled to benefit from the preference scheme. The recently adopted *Second Report and Order* in this proceeding[8] followed the *Notice* proposal and the evident legislative intent and included only the enumerated minority groups for purposes of the minority preference. Reflecting the absence of a record and public comment on the appropriateness of including women as a class among those eligible for a special diversification preference, the *Second Report and Order* did not address this preference issue.

II. *Discussion and Proposals*

10. The *Conference Report* on our amended lottery authority indicates that the lottery preference scheme is to some degree intended to substitute for the "significant comparative advantages" which are provided in the Commission's comparative broadcasting licensing hearings to "minority-controlled applicants and to applicants with a low degree of ownership interest in mass communications media."[9] In comparative proceedings, merit is awarded to applicants with women as principals, this factor being considered under the integration of ownership and management criterion.[10]

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[6] *Amendment of the Commission's Rules to Allow the Selection from Among Certain Competing Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 91 F.C.C. 2d 911 (1982) (hereinafter "*Second Notice*").

[7] *Id.*, at 924–926, 932, 939.

[8] 48 Fed. Reg. 27182 (1983), *appeal docketed sub nom. National Latino Media Coalition v. FCC*, No. 83–1785 (D.C. Cir. July 26, 1983).

[9] *Conference Report II, supra*, at 40. The conferees observe that "the degree of advantage, merit, or preference heretofore awarded to such applicants need not be precisely duplicated in the administration of a random selection system." *Id.*

[10] It has, however, been treated as "a merit of lesser significance" than that given for ownership and participation by racial and ethnic minorities. *Mid-Florida Television Corporation*, 69 F.C.C. 2d 607, 651–652 [70 F.C.C. 2d 281, 326–327] (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C. 2d 203 (1981); *Radio Gaithersburg, Inc.*, 72 F.C.C. 2d 820, 829 (Rev. Bd. 1979), *rev. denied*, FCC 80–734, Dec. 4, 1980, *aff'd per curiam without opinion*, No. 81–1023 (D.C. Cir. October 19, 1981). See, also, *Horne Industries, Inc.*, 54 R.R.2d 249 (Rev. Bd. 1983); *Gilbert Broadcasting Corporation*, 91 F.C.C. 2d 450, 469 (1982); *Gainsville Media, Inc.*, 70 F.C.C. 2d 143,

The policy considerations underlying this action are essentially the same as those governing the award of merit to racial and ethnic minorities, and the award for female participation has in fact been termed a credit for "minority enhancement."[11] Thus, the failure to provide a preference or other special consideration for applicants with significant female ownership involvement means that such applicants are situated substantially differently in the lottery context than would be the case in a traditional comparative proceeding.[12]

11. A question therefore arises as to the propriety of providing a lottery preference for women similar or equal to that already created by the *Second Report and Order* for designated racial and ethnic minorities. Such action would appear to be consistent with the Congressional concern that the lottery preference scheme be reflective of the status quo in the comparative process, and might further the policy objectives articulated by the Commission in support of its traditional allocation of comparative credit for female ownership and participation. In the context of the lottery legislation, two distinct avenues of conferring preferences to women are available: first, to treat women as a "minority group" for purposes of the minority ownership preference provided for under Section 309(i)(3)(A) of the statute; or, second, to accord women as a class a preference for media ownership diversification beyond the normal diversification preference,[13] finding that women as a class are entitled to such a preference through the exercise of our residual jurisdiction under the public interest standard.

12. The possible application of the minority ownership preference to women was debated at some length by the Commission in the

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149–150 (Rev. Bd. 1978), *rev. denied*, 72 F.C.C. 2d 795 (1979); *WPIX, Inc.*, 68 F.C.C. 2d 381, 411–412 (1978). It has been held that "merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation . . . Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value." *Mid-Florida Television Corporation, supra.*

[11] *Van Buren Community Service Broadcasters, Inc.*, 87 F.C.C. 2d 1024 (I.D. 1981), *aff'd*, 87 F.C.C. 2d 1018 (Rev. Bd. 1981), *settlement approved*, 88 F.C.C.2d 1733 (1982).

[12] The Commission has not, however, set up a special program to further women's ownership of broadcast facilities, while such a program has been established to advance minority ownership. *Wuenschel Broadcasting Co., Inc.*, 74 F.C.C. 2d 389 (1979); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979, 984 (1978).

[13] Under the terms of the lottery statute, preferences for minority and media ownership may be cumulated. *Conference Report II, supra*, at 41–47. See, also, para. 18, *infra*.

deliberations accompanying the adoption of the *Second Report and Order*.[14] By way of general summary, the new statutory lottery authority states that the term "minority group" "includes" certain specified racial and ethnic minorities. The word "includes" is usually a term of enlargement, not of limitation. It conveys the conclusion that other things are "includable" which have not been specifically enumerated by the statute.[15] Thus, the category may be open to expansion. We have observed that the merit awarded women in the comparative process is in the nature of that awarded racial and ethnic minorities, and has even been viewed as a "minority enhancement" credit. Further, although women constitute a majority of the U.S. population, this factor would not preclude their inclusion in the category, for, as one court has stated, the word "minority" "does not have a merely numerical denotation." Rather, in the context of equal protection considerations, "it refers to an identifiable and specially disadvantaged group."[16]

13. As an ordinary matter, however, the term "minority" is not generally viewed as encompassing women, and thus inclusion of women within the class may be contrary to general principles of statutory construction.[17] This concern takes on additional meaning when we turn to the *Conference Report* accompanying our initial lottery authority, and note that in discussing the "underrepresented" groups intended to benefit from the preference, the conferees specifically distinguished between minorities and women. The concern is furthered by the apparent focus on the "racial and ethnic" nature of "minorities" in the *Conference Report* on the second legislative enactment.[18] Nonetheless, neither in the statute as amended, nor in the language of the second *Conference Report*, is the Commission expressly barred from including women within the ambit of "minority groups", and sufficient discretion may exist for us to undertake this action. The Commission therefore requests comment on whether it would be permissible or appropriate to amend Section 1.1621 of its rules to include women within the category of "minority group" for lottery purposes.

14. As we have indicated above, another approach to the

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[14] The videotape of the Commission's discussion of that item is available for review and consideration by those commenting in this proceeding and is hereby incorporated into the record herein.

[15] *Argosy Limited v. Hennigan*, 404 F.2d 14, 20 (5th Cir. 1968). 1968). "When a statute is phrased in this manner, the fact that the statute does not specifically mention a particular entity . . . does not imply that the entity falls outside of the definition." *Highway and City Freight Drivers, Dockmen and Helpers, Local Union No. 600 v. Gordon Transport, Inc.*, 576 F.2d 1285, 1289 (8th Cir. 1978).

[16] *Graves v. Barnes*, 343 F.Supp. 704, 730 (W.D. Tex. 1972), *rev'd in part on other grounds sub nom. White v. Register*, 412 U.S. 755 (1973).

[17] *Statutes and Statutory Construction* (Sutherland, 4th ed.), at §47.18. *But see Van Buren Community Service Broadcasters, Inc., supra* n. 11.

[18] See, also, *Statutes and Statutory Construction, supra*, at §§22.29–22.30.

inclusion of women as a group within the lottery preference scheme would be the Commission's establishment of a specific diversification preference for women through the exercise of its residual authority under the public interest standard. The provisions of Section 309(i), the lottery amendments, are to be construed together with the remainder of the Communications Act,[19] under which the Commission has broad jurisdiction to act in the public interest.[20] Thus, unless the lottery amendments are found by their own terms or intent to prohibit such action, the Commission would appear to retain whatever authority it might otherwise have had to act in this regard. We solicit comment on this proposal.

15. Specific factors which must be considered in connection with creation of such a diversification preference include: (a) the legal and factual basis of the preference, together with such findings as are necessary; (b) the weighting of the preference to be awarded; and (c) whether award of a preference for women's ownership should be precluded by or considered in addition to any other preference conferred upon a given applicant. Presumably the basis for the award of a preference would be the underrepresentation of women in mass media ownership due to past discrimination, and the remedial benefit and enhancement of diversity consequently to be achieved by implementing a preference scheme. Although the conferees stated their view that women are "significantly underrepresented" in the ownership of telecommunications facilities,[21] the Commission has not as yet developed record evidence nor received responsive public comment that are the prerequisites for making an administrative determination on this issue.[22] However, the Commission has recently concluded a study designed to identify the extent of women's ownership of broadcast facilities.[23] The study indicates that women are majority owners of 8.6 percent of AM stations, 9 percent of FM stations, and 2.8 percent of television stations.[24] A copy of this study will be placed in the docket. We request comment on its findings, which appear to indicate a disproportionately low level of women's ownership.[25]

16. As indicated in para. 4, *supra*, gender-based classifications are subject to a high level of judicial scrutiny. However, such classifications, if enacted to remedy past discrimination, are constitutionally permissible. *Califano v. Webster*, *supra*, at 317. While the

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[19] *Statutes and Statutory Construction*, *supra*, at §§22.34–22.35.

[20] *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981).

[21] *Conference Report II*, *supra*, at 44–45.

[22] *Wuenschel Broadcasting Co., Inc.*, *supra*, at 390–391.

[23] *Female Ownership of Broadcast Stations*, ELRA Group, Inc., May, 1982.

[24] The data is subject to the qualification that interests of less than one percent are generally not reported in licensees with more than 50 shareholders.

[25] As to the status of women's business ownership generally, see *Selected Characteristics of Women-Owned Businesses 1977*, Bureau of the Census, October, 1980.

Commission has found that women have been historically discriminated against in employment,[26] we have not developed a complete record as to the nexus between past discrimination and women's ownership of broadcast facilities. We seek comment on this relationship,[27] as well as legal analysis regarding the nature of the necessary findings. Comment is particularly solicited as to whether the Commission is itself competent to make such findings, or whether Congressional action is required.[28] We also invite commenters to address the issue of whether the Commission should, or as a matter of law must, determine the type of preference to be applied based on the record of past discrimination. We request comment as to the relevance of these issues to the treatment of women as a "minority group" for purposes of the minority preference. An additional potential problem arises regarding the situation in which a husband who would otherwise apply for a construction permit in his own name submits the application in the name of his spouse in order to obtain a preference. We seek comment as to whether this possibility poses a significant potential for abuse of Commission processes.

17. In the first *Notice* in this docket, we proposed that a fixed relative preference of 2:1 be provided to all applicants receiving the diversity-type preference then under consideration, or, in the alternative, that a somewhat lower preference be provided women (and the other groups then under consideration) than minorities.[29] A somewhat reduced diversification preference for women would be consistent with the slightly weaker "merit" which has been provided women in the comparative hearing context. Since we have, in the *Second Report and Order*, adopted a fixed relative preference of 2:1 to benefit minorities, it would seem that if a lower preference is adopted for women, it might be set at 1.5:1. However, the case law in this area suggests that the magnitude of any preference be tailored to the degree of past discrimination. Should this interpretation of the law be correct, it would be difficult to determine with precision the appropriate preference ratio. We therefore request commenters to address these issues. We solicit comment on the alternative proposals, as well as suggested options.

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[26] *Equal Employment Program*, 32 F.C.C. 2d 708, 709 (1971).

[27] In soliciting such comment, we in no way contend that women have not suffered from a history of discrimination in the United States. We seek only to develop a legally sufficient record for agency action. As to the general historical perspective, see, for example, *The Bottom Line: Unequal Enterprise in America, Report of the President's Interagency Task Force on Women Business Owners*, June, 1978, at 87–93, 147–150.

[28] As to the matter of the sufficiency of findings necessary to support a preference, see, for example, *Califano v. Webster*, *supra*, at 317. See, also, *Fullilove v. Klutznick*, 448 U.S. 448 (1980), at 473, 483 (Burger, C.J.), 497–498, 515 (Powell, J., concurring).

[29] *First Notice*, *supra*, at 492–493. We proposed a lower preference for women on the assumption that women are less "underrepresented" than minorities.

18. The first *Notice* also proposed that "an applicant who qualifies as a member of two or more underrepresented groups (for example an individual who is Hispanic and female) will receive just a single and not a multiple preference." The preference received would be the highest one to which the applicant is entitled. It was our view that this approach would assure that the applicant received a significant but not "inappropriately disproportionate" preference.[30] In the intervening time since we first suggested this approach, we have adopted a preference scheme which allows those eligible to combine both a minority and a diversity preference. Thus, it would appear equitable to provide for combining both the special women's and general diversity preferences. However, we request comment on the merits of this resolution, and on the propriety of allowing for the combining of minority and women's preferences.

19. If at the conclusion of this proceeding the Commission determines that it will award a preference or similar benefit to women as a group in the context of mass media lotteries, that preference must be capable of being integrated into the complex lottery scheme adopted in the *Second Report and Order* with minimal disruption. Thus, we propose to treat such matters as the amount of female ownership required for an applicant to receive the preference (more than 50 percent), the consideration of various types of ownership interests—such as limited partnership shares—for preference purposes, amendments to applications to improve preference standing, and challenges to preference claims, as well as all administrative and technical requirements, in the same manner for applicants claiming the women's preference as for those claiming the minority preference.

20. In the event that the Commission determines that it does not have jurisdiction to establish preferences for women in mass media lotteries, it will forward to the Congress documents reflecting the record developed in response to this *Notice*, together with such recommendations as are appropriate.

III. *Administrative Matters.*

21. Authority for this proposed rulemaking is contained in Section 1, 3, 4(i) and (j), 303, 309(i) and 403 of the Communications Act of 1934, as amended. Pursuant to applicable procedures set forth in §§1.415 and 1.419 of the Commission's Rules, interested parties may file comments on or before December 5, 1983, and reply comments on or before December 27, 1983. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments provided that such information or a writing indicating

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[30] *Id.*, at 492.

the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

22. For purposes of this non-restricted notice and comment rulemaking proceeding, members of the public are advised that *ex parte* contracts are permitted from the time the Commission adopts a notice of proposed rulemaking until the time a public notice is issued stating that a substantive disposition of the matter is to be considered at a forthcoming meeting or until a final order disposing of the matter is adopted by the Commission, whichever is earlier. In general, an *ex parte* presentation is any written or oral communication (other than formal written comments/pleadings and formal oral arguments) between a person outside the Commission and a Commissioner or a member of the Commission's staff which addresses the merits of the proceeding. Any person who submits a written *ex parte* presentation must serve a copy of that presentation on the Commission's Secretary for inclusion in the public file. Any person who makes an oral *ex parte* presentation addressing matters not fully covered in any previously-filed written comments for the proceeding must prepare a written summary of that presentation on the day of oral presentation. That written summary must be served on the Commission's Secretary for inclusion in the public file, with a copy to the Commission official receiving the oral presentation. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. See generally, Section 1.1231 of the Commission's rules, 47 C.F.R. §1.1231.

23. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96–354, 94 Stat. 1164, 50 U.S.C. §601 et seq.) (1981).

24. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments, and supporting documents. If participants want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be

available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. For information on this proceeding, contact Steven A. Bookshester, Office of General Counsel, (202) 254-6530.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

Appendix "A"

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. §601 *et seq.*, the Commission issues the following initial regulatory flexibility analysis.

1. *Reason for Action and Objective.* The Commission believes it appropriate to consider whether the public interest would be served by provision of a preference for female applicants for initial construction permits and licenses in mass media services subject to lottery. The only such service at present is low power television (LPTV). Such preference might be awarded either through inclusion of women in the "minority groups" presently entitled to the minority preference, or by creation of a special diversity preference for women beyond the diversity preference already established. Such a remedial preference might be expected to enhance diversity of broadcast station ownership and, therefore, diversity of programming.

2. *Legal Basis.* The authority for this proposed rule making is contained in Sections 1, 3, 4(i) and (j), 303, 309 and 403 of the Communications Act of 1934, as amended.

3. *Small entities affected.* Approximately 12,000 applications for LPTV licenses are presently on file with the Commission, and additional applications will be submitted in the future. The Commission expects that as many as 4,000 new LPTV stations may be created by the time the LPTV service is fully licensed. Existing and potential applicants for LPTV licenses range in size from single individuals and small partnerships to large publically-traded corporations. Establishment of the preference under consideration would provide some advantage to small entities with majority female ownership seeking such licenses. Similarly, some small entities which are not majority-owned by women might be somewhat disadvantaged relative to female-controlled applicants and the relative value of a preference presently provided a small entity not majority-controlled by women would be somewhat reduced.

4. *Recording, record keeping and other compliance requirements.* The proposed change would require submission of data as to applicant ownership by women.

5. *Federal rules which overlap, duplicate or conflict with this rule.* There appear to be none.

6. *Any significant alternatives minimizing impact on small entities and consistent with the stated objective.* There appear to be none.

Concurring Statement
of
Chairman Mark S. Fowler

Re: Third Notice of Proposed Rulemaking in Docket No. 81-768

Today's decision initiates a rulemaking proceeding to consider establishing preferences for women in mass media lotteries. I concur in the result for the reasons set forth in my Separate Statement in the *Second Report and Order in Docket No. 81-768,* 48 Fed. Reg. 27,182 (1983), *appeal docketed sub nom. National Latino Media Coalition v. FCC,* No. 83-1785 (D.C. Cir. July 26, 1983).

CONCURRING STATEMENT
OF
COMMISSIONER HENRY M. RIVERA

RE: Third Notice of Proposed Rulemaking in General Docket No. 81-768.

To the extent this Notice will facilitate the development of a record on female broadcast ownership and the unique obstacles to such ownership faced by women which would warrant preferential treatment in broadcast licensing, it is an undertaking that is long overdue and I emphatically endorse it. I would be less than candid, however, if I did not express my belief that there are formidable, if not insurmountable, legal obstacles to enlarging the preference scheme set out in Section 309(i)(3)(A), as amended. Therefore, if the record developed in this proceeding confirms that it would be desirable as a policy matter to grant distinct preferences to women as a group, it may well be preferable for the Commission to present the case to Congress during the periodic legislative review of the preference scheme and to urge amendment of the statute.

Application, Dismissal
Hearing, Right to
Pleading, Right to File

Review Board denied appeal of dismissal of application lacking viable transmitter site. Attempt to create site hearing issue was untimely, and failure of ALJ to set schedule for applicant to reply to dismissal motion was harmless error in the face of a patently defective application and the absence of an attempt to file.

–Shoblom Broadcasting, Inc.
BC Docket No. 82–135

FCC 83R–65

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of	
SHOBLOM BROADCASTING, INC. Yucca Valley, California	BC Docket No. 82–135 File No. BPH-800813AA
DEANNE C. DAVIS, JOHN J. DAVIS, SAMMY L. FIELDS, a Partnership d/b/a CORINTHIANS XIII BROADCASTING COMPANY Yucca Valley, California	BC Docket No. 82–136 File No. BPH-800825AG
BUENA VISTA BROADCASTING COMPANY Yucca Valley, California	BC Docket No. 82–137 File No. BPH-800827AA
DESERT RADIO, INC. Yucca Valley, California	BC Docket No. 82–139 File No. BPH-800829AI
ROYCE INTERNATIONAL BROADCASTING COMPANY Desert Hot Springs, California	BC Docket No. 82–140 File No. BPH-800829AO

For a Construction Permit for a
New FM Broadcast Station

MEMORANDUM OPINION AND ORDER

(Adopted: August 31, 1983; Released: September 7, 1983.)

BY THE REVIEW BOARD:

1. In a recent Order, the Review Board denied Royce International Broadcasting Company's (Royce) appeal from Administrative Law Judge (ALJ) Frederic J. Coufal's ruling which denied Royce's October 22, 1982 petition for leave to amend its application to specify a new transmitter site. *Shoblom Broadcasting, Inc.*, FCC 83R-27, 53 RR 2d 1203 (Rev. Bd. 1983). Subsequently, the ALJ granted a motion to dismiss Royce's application by Corinthians XIII Broadcasting Company (Corinthians) because "Royce has no transmitter site and it is thus without a viable application." *Order* (hereinafter *"Dismissal Order"*), FCC 83M-2027, released June 21, 1983. The Board is now considering Royce's July 8, 1983 appeal of the *Dismissal Order* and Corinthian's opposition to that appeal. For the reasons that follow, we affirm the ALJ's order dismissing the Royce application.

2. In its appeal, Royce asserts that: (1) because all procedural dates were suspended by the ALJ pending the Board's resolution of Royce's prior appeal, and were not reestablished thereafter, Royce was not given an opportunity to file an opposition to Corinthians' dismissal motion; and (2) because no transmitter site availability issue was ever specified against it following the rejection of its October 1982 site change amendment, Royce had no opportunity to present hearing evidence on that matter. Royce therefore requests a remand of this proceeding to the ALJ so that it can formally oppose dismissal of its application and, in the event the dismissal is rescinded and a transmitter site issue is added against it, it can present evidence on that issue. Royce states that it "is prepared to present evidence that it has continued to pursue final authorization for the [originally-proposed] Eureka Peak site . . . and that it now has such final authorization." Royce Br. at 3, n.**. Corinthians responds that because Royce knew 14 months before designation of its application for consolidated hearing that its originally-proposed site was unavailable, Royce was not harmed by the alleged recent procedural deprivations and that Royce's application was properly dismissed because it was defective *per se*.

3. Royce's appeal will be denied. The ALJ's dismissal of its application following our refusal to allow the October 22, 1982 site change amendment was essentially a ministerial act dictated by the then-prevailing posture of Royce's application—Royce had been without a viable transmitter site since January 1981 (see paragraph 4, *infra*), its application was therefore substantially incomplete and "patently not in accordance with the FCC rules, regulations, or other

requirements," Section 73.3566(a) of the Rules, 47 CFR 73.3566(a), and Royce was thus unqualified technically to be a Commission licensee. Because Royce conceded in June 1982 that its proposed site was not available (Royce Opp. to Petition to Enlarge Issues filed June 2, 1982, at 5), there was no "substantial and material question of fact" concerning this matter from that time onward and, therefore, no basis for the ALJ to designate a site issue against Royce under Section 309(d) of the Communications Act of 1934, as amended, before dismissing the application.[1] *See Tele-Media Corporation* v. *FCC*, 697 F.2d 402, 409 (D.C. Cir. 1983); *Chuck Stone* v. *FCC*, 466 F.2d 316, 323 (D.C. Cir. 1972). Hence, it would have been procedurally permissible for the ALJ to dismiss Royce's application, *sua sponte*, even without Corinthians' motion and certainly without first designating and hearing Royce's requested site availability issue. Royce's inability to reply to a document that need not have been filed was nugatory. Moreover, Royce had two months between the time of the Board's ruling on its first appeal and the ALJ's dismissal of its application in which to seek the ALJ's permission to respond to the motion to dismiss. It did not do so, instead waiting until after the ALJ acted. Procedural "rights" that are not exercised may be deemed waived; pleaders, like academicians, must either "publish or perish."

4. Royce would now have us believe that it never truly conceded loss of its original site (since it remained optimistic "that an ultimate grant of a use permit for this site can still be achieved," Royce Opp., *supra*, Attachment D, at 3) and that its latest site proposal should not be treated as a new one at all, but simply as a restatement of its original site proposal. Thus, Royce now asserts (without any support) that its former site has again become available. However, this development—even if true—is simply happenstance or coincidence. The operative question is: did Royce have reasonable assurance of the site when it said it did. It clearly did not. Having known "at least as early as January 1981" that its originally-proposed site was unavailable, *Shoblom Broadcasting, supra*, at 1204, Royce's application became patently defective at that point, and anytime thereafter the defect could only be cured by an amendment accompanied by a suitable good cause showing. Royce's October 22, 1982 amendment failed that test, *Id.*, and its present bootstrapping efforts are suspect. But the time for amendments or other redemptive acts has long passed, and Royce's "fatal deficiency" (lack of a viable transmitter site), *id.* at 1207, has become terminal. The ALJ properly dismissed Royce's application, and any error on his part in not seeking or waiting for a response to Corinthians' motion to dismiss was harmless.

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[1] As explained in paragraph 4, *infra*, Royce cannot attempt to re-create a hearing issue at this late date.

5. **ACCORDINGLY, IT IS ORDERED, That the appeal filed July 8, 1983 by Royce International Broadcasting Company IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION
JEROLD L. JACOBS, *Member, Review Board*

Application, Amendment of, Engineering Change
Application, Dismissal of
Interlocutory Ruling Appeal From
Site Loss of

> **Review Board granted appeal from ALJ's rulings denying a petition for leave to amend specifying a new antenna site and dismissing application for new AM station. Elements of good cause were considered in light of the equities of the case; *i.e.*, loss of the site occurred due to the intercession of a competing applicant.**
> **–*Valley Broadcasters, Inc.***
> **BC Docket No. 82–436**

FCC 83R–69

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re Applications of

VALLEY BROADCASTERS, INC. KAPS, Mount Vernon, Washington	BC Docket No. 82–436 File No. BP-801112AB
NORTHWEST INDIAN WOMEN BROADCASTERS, INC. Portland, Oregon	BC Docket No. 82–437 File No. BP-801113AD
THE NAVAJO NATION Window Rock, Arizona	BC Docket No. 82–440 File No. BP-810306AH
For Construction Permit	

MEMORANDUM OPINION AND ORDER

(Adopted: September 8, 1983; Released: September 16, 1983)

BY THE REVIEW BOARD:

1. The Review Board has under consideration an appeal filed June 22, 1983, by Northwest Indian Women Broadcasters, Inc. (Northwest), pursuant to Section 1.301 of the Commission's Rules,[1] from rulings by ALJ Byron E. Harrison denying its May 23, 1983

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[1] Section 1.301 (47 CFR §1.301) provides that the presiding ALJ's interlocutory

petition for leave to amend specifying a new antenna site and dismissing its application for authority to construct a new AM station in Portland, Oregon. The Mass Media Bureau supports the appeal and Valley Broadcasters, Inc. (Valley), a party seeking authority to change frequencies in Mount Vernon, Washington, opposes it.[2] For the reasons set out below, we will reverse the ALJ's rulings.

2. Three applicants remain in this proceeding: Northwest and Valley, which are mutually exclusive because of reciprocal destructive daytime interference; and Navajo Nation (Navajo), an applicant for a new station in Window Rock, Arizona, which was deemed mutually exclusive with Northwest because Navajo's proposal would impose upon Northwest a nighttime limit that could impair Northwest's ability to serve Portland as required by Section 73.24(j) of the Commission's Rules.[3] *See Memorandum Opinion and Order*, FCC 82-324, released August 3, 1982 (*"Designation Order"*). The *Designation Order* also held that consolidated consideration of the latter two applications was appropriate to consider a potential loss of nighttime white area service by Navajo that would result from a grant of Northwest's proposal. *Id.* However, Navajo and Valley are not mutually exclusive. The applications were designated for hearing on, *inter alia*, Section 307(b) and contingent comparative issues. *Id.* Subsequent to the release of the *Designation Order*, Northwest repeatedly, but unsuccessfully, attempted to amend its application to eliminate the mutual exclusivity with Navajo and to bring its proposal into substantial compliance with Section 73.24(j). *See* FCC 82M-3100, released October 7, 1982; FCC 83M-57, released January 7, 1983; FCC 83M-1197, released April 12, 1983.

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ruling is appealable as a matter of right if it "denies or terminates the right of any person to participate as a party to a hearing proceeding. . . ." *See Sco-Kim, Inc.*, 90 FCC 2d 960 (Rev. Bd. 1982).

[2] Also before the Board for consideration are: (a) a motion to strike the appeal, filed July 1, 1983 by Valley and opposition thereto, filed July 13, 1983, by Northwest; (b) a petition for waiver of page limitation for Valley's opposition to the appeal, filed July 1, 1983; (c) a request for waiver of page limitation for Northwest's reply, filed July 14, 1983; (d) a tender of supplement to amendment of May 23, 1983, filed July 7, 1983, by Northwest; and (e) a motion to dismiss tender of supplement to amendment, filed July 15, 1983, by Valley and an opposition thereto, filed July 21, 1983, by Northwest. Northwest's appeal, which appellant argues incorrectly was filed pursuant to §1.302, exceeds both the time and page limitations and is subject to dismissal; however, it would serve no useful purpose here to make Northwest refile since no prejudice has been shown and the parties have had ample opportunity to advance their arguments. The waivers requested by both Valley and Northwest will therefore be granted and the motion to dismiss the appeal denied. Northwest's tender of supplement to amendment (a financial showing) will be dismissed without prejudice to be refiled before the ALJ and Valley's motion to dismiss such tender will be dismissed as moot.

[3] Section 73.24(j) (47 CFR §73.24(j)) requires AM applicants to encompass the business districts of their communities with a 25mV/m contour and the residential areas with a 5 mV/m contour.

3. In its application, as amended on February 1, 1983, Northwest proposed to locate part of its ground system for its antenna site on land owned by the Oregon Yacht Club. On April 6, 1983, five days before the scheduled commencement of hearing, Northwest notified the ALJ that the Oregon Yacht Club had withdrawn its consent for use of the land and that its proposed antenna site was therefore unavailable. A conference was held on the following day wherein the ALJ held that Northwest would be permitted until April 18 (*i.e.*, eleven days) to locate a new site and to give assurances that it had the ability to acquire the site, that it would have to file an amendment (assuming a new site could be located) reflecting this information by May 2, and that it must exchange the new hearing exhibits by May 23. (*See* Tr. 159–160.) The hearing was scheduled for June 13. (Tr. 159.) The ALJ further held that the amendment could not be a major amendment within the meaning of Section 73.3571 (Tr. 148); nor could it alter the Section 307(b) or comparative aspects of the case by improving Northwest's coverage of Portland or by alleviating the clipping of Navajo's white area service. (Tr. 159, 162–63.) Shortly thereafter, Northwest learned that the withdrawal of its permission to use the Oregon Yacht Club land was due to the intercession of Valley with the property owner; a petition to enlarge issues regarding this matter was filed by Northwest on April 28.[4] On May 9, Northwest located a new site, filed its amendment on May 23, and exchanged its engineering exhibit on the specified exchange date.

4. In that amendment, Northwest proposed to move the transmitter-antenna site approximately 20 miles, to construct a 5 tower antenna system, and to increase the nighttime power from 1kW to 10 kW with a directional antenna pattern during nighttime hours.[5] The amendment would also eliminate the mutual exclusivity with Navajo and bring Northwest's proposal into compliance with Section 73.24(j). In a bench ruling on June 9,[6] the ALJ denied the petition for leave to amend for lack of good cause and for failure to comply with the foreseeability requirement of Section 73.3522(b)(1) governing post-designation engineering amendments. The ALJ noted that, with respect to foreseeability, the "problems" with Northwest's antenna site (*i.e.*, non-compliance with Section 73.24(j) and interference to Navajo's white area) were apparent to Northwest prior to the designation of its application for hearing (Tr. 168–69); that Northwest lacked due diligence since the amendment involving the new site failed to meet the deadline set at the April 7 conference and no timely continuance was sought (Tr. 169–70); that the amendment

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[4] Valley does not deny its intercession.

[5] The proposed 10 kW nighttime power would require a waiver of Section 73.21(a)(2)(ii)(c) of the Commission's Rules.

[6] Memorialized by *Order* FCC 83M-1918, released June 13, 1983.

was voluntary (Tr. 170); that it failed to comply with the conditions imposed at the April 7 conference (Tr. 169); that the amendment would require the addition of new issues (Tr. 170) and prejudice the other parties and enhance Northwest's comparative position (Tr. 174–75); and, that he had no authority to grant a waiver of Northwest's proposed nighttime power (Tr. 171). On June 13, the hearing was held wherein Northwest's application was dismissed, pursuant to a motion by Navajo, after Northwest was unable to offer any engineering exhibits (Tr. 215, 219). *See Order*, FCC 83M-1983, released June 17, 1983. Northwest appeals the June 9 ruling denying its May 23 petition for leave to amend as well as the June 13 ruling dismissing its application.

5. The Board will reverse the ALJ's rulings. The Commission has indicated previously that the elements of good cause must be considered in light of the equities of the case. *See Anax Broadcasting, Inc.*, 87 FCC 2d 483, 489, (1981); *Alabama Citizens for Responsive Public TV, Inc.*, 69 FCC 2d 1061, 1071 (1978). And, it is significant here in considering these elements that the loss of the site occurred due to the intercession of a competing applicant. Turning to the reasons given by the ALJ in denying the May 23 petition for leave to amend, we conclude initially that he was incorrect in determining that Northwest's amendment resulted from a voluntary act or foreseeable "problems." The direct causal event necessitating the amendment was an unexpected loss of the site, an event—almost by definition—both unforeseeable and involuntary. Although in disagreement with the ALJ's earlier refusal to allow it to amend to eliminate the white area and §73.24(j) coverage problems, Northwest continued to prosecute its application with the original engineering proposal, as amended, until the site was lost.[7] Moreover, under the circumstances, Northwest acted with due diligence in locating a new site, filing an amendment, and meeting the exchange date for the hearing exhibits. *See William R. Gaston*, 35 FCC 2d 615, 617 (Rev. Bd. 1972). Additionally, the ALJ was in error in specifying that the new site could not constitute a major change within the meaning of Section 73.3571. *See California Broadcasting Corp.*, 90 FCC 2d 800, 808 (1982). Generally, in fairness to the ALJ, we would be reluctant to overturn an amendment ruling where, as here, the applicant lost its site after designation, because of the disruption of the proceeding with its resultant delay of service and the prejudice to the other applicants. *See Belo Broadcasting Corp.*, 68 FCC 2d 1313 (1978). Here, however, we perceive no undue prejudice to the other applicants or comparative enhancement to Northwest. The amendment would eliminate the mutual exclusivity between Northwest's and Navajo's

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[7] We need not rule on Northwest's contention that the ALJ erred in not allowing it to amend shortly after designation to eliminate the mutual exclusivity with Navajo and bring its proposal into compliance with §73.24(j).

applications, and it would obviate the need for retaining Navajo's application in this proceeding. *See Fine Music, Inc.*, 8 FCC 2d 1018 (Rev. Bd. 1967) where an amendment which eliminated mutual exclusivity based on interference between two applicants was accepted because the elimination of interference was not considered the type of prejudice that should dictate the denial of an amendment. With respect to Valley's application, the Commission has previously mooted a comparative advantage on coverage where, as here, the site loss stemmed from events beyond the control of the applicant. *See California Broadcasting Corp., supra*, 90 FCC 2d at 811 n.41; *compare Alabama Citizens for Responsive Public TV, Inc., supra*, 69 FCC 2d at 1072. *A fortiori*, a comparative advantage derived from a deficiency in its competing applicant's coverage should be mooted. And, any disruption that may ensue in this proceeding because of the amendment is wholly due to its intercession with the site's property owner. Both the Bureau and Northwest claim that there is no need for additional issues and that the ALJ has sufficient authority to grant a waiver of Northwest's nighttime power. While we are inclined to accept their arguments, we need not decide such questions here since we are of the view that even if further issues are necessary, the fact that the site was lost because of the actions of the remaining competing applicant requires acceptance of Northwest's amendment. *See Alabama Citizens for Responsive TV, Inc., supra*, 69 FCC 2d at 1071.

6. ACCORDINGLY, IT IS ORDERED, That the Northwest Indian Women Broadcasters, Inc.'s Appeal from Denial of Petition for Leave to Amend and from Dismissal of Application, filed June 22, 1983, IS GRANTED, and the oral rulings made on June 9 and June 13, 1983 and confirmed by *Orders* FCC 83M-1918 and FCC 83M-1983, released June 13 and June 17, 1983, respectively, ARE REVERSED: and

7. IT IS FURTHER ORDERED, That the Tender of Supplement to Amendment, filed July 7, 1983, by Northwest Indian Women Broadcasters, Inc. and the Motion to Dismiss "Tender of Supplement to Amendment," filed July 15, 1983, by Valley Broadcasters, Inc., ARE DISMISSED; and

8. IT IS FURTHER ORDERED, That the Petition for Waiver and Request for Waiver, filed July 1 and July 14, 1983, by Valley Broadcasters, Inc. and Northwest Indian Women Broadcasters, Inc., respectively, ARE GRANTED; and

9. IT IS FURTHER ORDERED, That the Motion to Strike, filed July 1, 1983, by Valley Broadcasters, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION
NORMAN B. BLUMENTHAL, *Member, Review Board*

CATV Program Exclusivity, Network Programming
CATV Special Relief
Rules, Waiver of

Request for waiver of Section 76.92 of the Rules granted. Petitioner demonstrated projected audience loss to station from waiver of nonduplication protection of only 3.09%.
–Vision Cable of Metrolina

FCC 83–438

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In re:	
VISION CABLE OF METROLINA	CSR-2087
Concord, North Carolina	NC0173
Cabarrus County, North Carolina	NC0174
Kannapolis, North Carolina	NC0195
Petition for Special Relief	

MEMORANDUM OPINION AND ORDER

(Adopted: September 22, 1983; Released: October 13, 1983)

BY THE COMMISSION: COMMISSIONER QUELLO CONCURRING IN THE RESULT.

1. On February 9, 1982, Vision Cable of Metrolina (hereinafter "Vision"), operator of a cable television system serving Concord, North Carolina, and neighboring communities, filed a petition for special relief seeking a waiver of Section 76.92 of the Commission's Rules. Absent the requested waiver, Vision would have to honor the request for network program nonduplication protection made of it by Westinghouse Broadcasting and Cable, Inc. (hereinafter "WPCQ-TV"), licensee of Station WPCQ-TV (NBC, Channel 36), Charlotte, North Carolina. Vision's petition is unopposed.

2. In support of its petition, Vision notes that its technically-integrated cable television system serves approximately 7,756 subscribers in communities in Rowan County and in Cabarrus County. Television Broadcast Station WXII (NBC, Channel 12), Winston-Salem, North Carolina, whose duplicating network programming WPCQ-TV seeks to black out, is significantly viewed in Rowan County, but not in Cabarrus County. According to Vision, it would be inordinately costly to delete WXII in Cabarrus County communities, and yet carry the station full time in Rowan County, which it is required to do, pursuant to Section 76.61(a) of the Rules. In addition,

citing *Vision Cable of Metrolina* (Concord, North Carolina), FCC 79-833, 75 FCC 2d 384 (1979), Vision contends that WPCQ-TV will not be adversely impacted by grant of the requested waiver.

3. In a supplement to its petition on February 18, 1982, Vision further argues that, because its single headend is located in Kannapolis (which straddles both Rowan and Cabarrus Counties), the system's design would necessitate an expenditure of over $100,000 in order to comply with WPCQ-TV's request and separate the two counties' service. Citing *inter alia, TelePrompTer of Florida, Inc.* (Polk County, Florida), FCC 75-106, 51 FCC 2d 195 (1975), and *Hamburg TV Cable, Inc.* (Leesport, Pennsylvania), FCC 77-738, 66 FCC 2d 725 (1977), Vision claims waiver is justified. In addition, utilizing a formula from *Texas Community Antennas, Inc. d/b/a Nacogdoches Cable TV* (Nacogdoches, Texas), FCC 78-525, 68 FCC 2d 1271 (1978), Vision also estimates that grant of its requested waiver would have an impact on WPCQ-TV of only 2.98% in terms of audience, and only 2.23% in terms of revenue. Accordingly, Vision contends that its request is in the public interest.

4. In order to obtain a waiver of the network nonduplication rules, a petitioner must submit specific evidence demonstrating adverse economic impact on the cable system as a consequence of compliance or, conversely, evidence demonstrating through a similarly specific factual showing that waiver will not adversely impact the broadcaster seeking protection. *See Texas Community Antennas, Inc.*, 68 FCC 2d at 1279-80. Although Vision has not submitted supporting documentation for its claim of economic burden, it has submitted a showing, based on a Commission formula, which Vision contends demonstrates that grant of its requested waiver, even on a market-wide basis, will not significantly impact WPCQ-TV adversely. A more refined staff analysis, which takes into account, *inter alia*, potential expansion of immature cable systems, such as Vision's own,[1] reveals estimated impact from grant of the requested waiver to be 3.09% on WPCQ-TV's audience, and 2.32% on the station's revenues.[2] In addition, WPCQ-TV has not attempted to show with

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[1] *See, e.g., Palm Beach Cable Television Co.* (North Palm Beach, Florida), FCC 80-301, 78 FCC 2d 1180, 1184 n. 6 (1980).

[2] The staff analysis utilizes the following formula:

$$\text{Audience Diversion} = \frac{A \times B \times C \times D \times E}{F}$$

where,

A = The number of affected cable subscribers. (Source: *Television Factbook*, Services Volume, 1981-82 edition, No. 50);

B = The percentage of ADI households using television (HUTs or market rating), on average, during the 9 AM to Midnight time period. For the Charlotte ADI, this figure is 37%. (Source: Arbitron, *Daypart Audience* specific factual data that its financial condition is such that the anticipated losses of revenue would adversely affect the public interest. We are not persuaded that the incremental two-step procedures which were first used nearly six years ago with respect to waivers of the then distant television signal carriage rules, should be followed herein or in the future network nonduplication protection waiver requests involving impact analyses.[3] Those earlier *ARTEC* procedures were burdensome and costly both to the parties involved and to the Commission and its processes. They were also highly litigious, often unnecessarily prolonging the Commission's ultimate resolution of the requested waiver. Moreover, the Commission's

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Estimates Summary, February 1982);

C = WPCQ-TV's average all day share of viewing in cable households in the county where each system is located. (Source: Arbitron, *County Coverage Surveys, 1982, CATV-Controlled*, when available);

D = This factor is an estimate of the percentage of WPCQ-TV's broadcast week which would be affected by the loss of nonduplication protection. This quantity is estimated to be 65%;

E = A fractionalization factor of 50%, which assumes the equal likelihood of a viewer choosing the distant signal over the local station when both are showing the same program; and

F = An estimate of WPCQ-TV's average 9 AM to Midnight audience. Using the February 1982 Arbitron *Daypart Audience Estimates Summary*, this figure is 18,000.

The expected audience diversion is then calculated for each system as follows:

Concord, Cabarrus, Kannapolis (Cabarrus Co., NC)

$$\frac{9{,}900 \times .37 \times .11 \times .65 \times .50}{18{,}000} = .0073 \text{ or } 0.73\%$$

Charlotte (Mecklenburg Co., NC)

$$\frac{27{,}696 \times .37 \times .12 \times .65 \times .50}{18{,}000} = .0222 \text{ or } 2.22\%$$

Monroe (Union Co., NC)

$$\frac{1{,}763 \times .37 \times .12 \times .65 \times .50}{18{,}000} = .0014 \text{ or } 0.14\%$$

The total estimated potential audience impact is 3.09%. Using the fact that 75 percent of an average station's revenues are related to its network audience, *see, e.g., Garryowen Corporation* (Great Falls, Montana), FCC 79–138, 90 FCC 2d 2336, 2341 (1979), leads to a prediction of an expected 2.32% revenue loss for WPCQ-TV.

[3] *Arlington Telecommunications Corporation d/b/a ARTEC* (Arlington County, Virginia), FCC 78–781, 69 FCC 2d 1923 (1978), *aff'd on recon.*, FCC 79–73, 70 FCC 2d 2291 (1979), *stay denied*, FCC 79–487, 73 FCC 2d 766 (1979), *appeal dismissed sub nom. The Committee to Balance the Impact Gaff and to Make ARTEC Constitutional v. FCC*, No. 79–1303 (D.C. Cir. Feb. 5, 1982).

disposition of numerous *ARTEC* cases since the institution of these procedures several years ago has established our expertise in this form of analysis, and such widespread precedent has afforded potential petitioners and objectors a sufficient basis for knowledge of the showing necessary for such an analysis. In view thereof, we must decline to apply such inefficient procedures to our processing of waiver requests such as these. Once petitioner has made its showing of potential impact, it will then be incumbent upon any opposing station claiming adverse impact to submit in its opposition pleadings a specific showing, supported by specific factual data (1) as to the station's financial condition, and (2) that the station's anticipated losses of revenue would adversely affect the public interest in light of the station's condition.[4] We must conclude, based on an analysis of the impact evidence, that grant of the waiver requested by Vision will not impair WPCQ-TV's ability to operate in the public interest.

5. In view of the foregoing, we find that grant of Vision's petition is in the public interest.

6. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-2087) filed February 9, 1982, by Vision Cable of Metrolina IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION
WILLIAM J. TRICARICO, *Secretary*

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[4] We caution interested parties, however, that all pertinent information available should be presented at this time. Pursuant to Section 1.106(b)(3) of the Rules, petitons for reconsideration which do not rely upon new facts or changed circumstances are subject to dismissal.

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